



KANSAS

SENTENCING GUIDELINES

DESK REFERENCE MANUAL

2017

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Graduated Felony Sanctions
Sentencing Grids

Available on the Kansas Sentencing Commission website www.sentencing.ks.gov:

Time Line of Selected Events Related to the KSGA

Selected Attorney General Opinions on Topics Related to the KSGA and Sentencing Issues

2017 DESK REFERENCE MANUAL

INTRODUCTION

The Kansas Sentencing Guidelines Desk Reference Manual (DRM) provides general instructions for application of the provisions of the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2017 Supp. 21-6801 *et seq.* The DRM contains features that we hope will not only inform users of the latest developments in 2017 sentencing law but also help to facilitate more efficient understanding and application of the law.

The Kansas Sentencing Commission (KSSC) encourages criminal justice professionals to contact our staff for further information and assistance concerning the Desk Reference Manual or the Kansas Sentencing Guidelines Act. Questions may be directed to our staff at (785) 296-0923, or by e-mail at kssc.office@ks.gov

In July 2011, the Kansas Criminal Code was moved from K.S.A. 21-3101 *et seq.* to K.S.A. 21-5101 *et seq.* statutory citations within the DRM cite to the new, recodified statute numbers. The Kansas Sentencing Commission's website also offers a cross-reference document between the new and former statute numbers.

The statutory listings of felonies and misdemeanors in Appendix D have also been modified to reflect the specific statutory violations based upon the 2017 Legislative Changes. As a reference, there is a new alphabetical index of crimes to help users locate the correct statute number. The complete versions of both the felony and misdemeanor statute files are posted under the "Agency Publications" link of the website.

In order to reduce the size of the Manual, the Time Line of KSGA Selected Events is posted, along with other Appendices, on the KSSC website at www.sentencing.ks.gov. Posting these documents on our website rather than publishing them in the Manual allows us to easily update the material as new information becomes available. All of the 2017 legislative changes relative to the sentencing guidelines remain in the Manual and are summarized in the first section.

ADDITIONAL COPIES

Copies of the Manual in hard copy and electronic form may be ordered from the Kansas Sentencing Commission at www.sentencing.ks.gov or may be accessed and printed free of charge at the KSSC website.

This Manual is not copyrighted. The entire text of this Manual, along with all of the grids, charts and forms, may be reproduced in part or in its entirety by any party wishing to do so. The Desk Reference Manual should always be used in consultation with the applicable Kansas statutes and related case law, the language of which controls.

TIME LINE OF KSGA SELECTED EVENTS

In the 2017 Legislative Session, the Legislature enacted several significant statutory changes affecting the general practice of criminal law and those specifically affecting sentencing law and procedure. We highlight the following:

1) SB 23 consolidates criminal prosecutions for fraud and abuse under the jurisdiction of the Attorney General and establishes the Office of the Securities Commissioner as a division under the jurisdiction of the Commissioner of Insurance.

2) House Sub for SB 40 amends human trafficking and related crimes.

The bill does the following:

- Creates new crimes concerning use of a “communication facility”, and creates new crimes of promoting travel for child exploitation, and internet trading in child pornography.
- Amends one of the four definitions of “human trafficking”
- Creates an affirmative defense from prosecution.
- Establishes and changes certain fines for crimes related to human trafficking and directs some or all of the fines to the Human Trafficking Victim Assistance Fund
- Increases the severity level for the crime of sexual exploitation of a child from level 5 to level 3 under certain circumstances.
- Amends Kansas Offender Registration Act to add the crime of promoting the sale of sexual relations to the list of sexually violent crimes.
- Requires applicants for issuance or renewal of a commercial driver’s license to complete training in human trafficking identification and prevention.

3) SB 112 creates and amends law regarding crimes and criminal procedure.

The bill does the following:

- Creates the crimes of aggravated domestic battery and amends the crimes of domestic battery, possession of drug paraphernalia, burglary, cruelty to animals, and dog fighting.
- Amends provisions concerning illegal sentences, postrelease supervision for persons convicted of sexually violent crimes, and expungement of arrest records
- Enacts the Law Enforcement Protection Act and provisions concerning the electronic recording of certain custodial interrogations.

4) HB 2092 amends law related to probation revocation, public disclosure of probable cause affidavits, mandatory minimum sentences, sentencing for capital crimes for intellectually disabled persons, decay of juvenile adjudications, and appeal of petitions for grand juries.

The bill does the following:

- Allows the court to revoke probation upon first violation if such sentence was granted as a result of a dispositional departure.
- Amends law regarding disclosure to the public of affidavits or sworn testimony underlying of an arrest warrant.
- Amends law concerning mandatory minimum terms of imprisonment for people who receive life sentences.
- Amends statute governing sentencing for a person with an intellectual disability who is convicted of capital murder or first degree premeditated murder.
- Amends statutes governing criminal history by adding an additional juvenile decay provision
- Provides a right to appeal the decision to not summon a grand jury.

2017 LEGISLATIVE CHANGES TO THE KSGA AND RELATED CRIMINAL LAW

This summary is by no means exhaustive in its coverage of the session but contains criminal sentencing and relevant collateral issues that may be of interest to criminal justice stakeholders. Bills referenced here can be found at www.kslegislature.org under the Bills and Laws tab.

Senate Bill 23

Consolidations; Office of the Securities Commissioner; Insurance Department; Attorney General; Prosecutorial Functions; SB 23

SB 23 establishes the Office of the Securities Commissioner of Kansas as a division under the jurisdiction of the Commissioner of Insurance (Insurance Commissioner) and amends law by consolidating certain prosecutorial functions of the Attorney General.

House Substitute for Senate Bill 40

Human Trafficking

House Sub. for SB 40 amends law concerning human trafficking, including the creation of new crimes and amendments to existing crimes and other related provisions.

New Crimes

The bill creates new crimes concerning use of a “communication facility,” which the bill defines as any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes telephone, wire, radio, computer, computer networks, beepers, pagers, and all other means of communication. The bill provides it is a severity level 7 person felony for a person to knowingly or intentionally use any communication facility to commit the crimes of human trafficking, commercial sexual exploitation of a child, or promoting the sale of sexual relations, as well as in any attempt, conspiracy or solicitation of those crimes. It is a class A person misdemeanor to use a communication facility in committing, causing, or facilitating the commission of the crime of buying sexual relations. Defendants have an affirmative defense if they were subjected to human trafficking, aggravated human trafficking, or commercial exploitation of a child.

Additionally, the bill creates the crime of promoting travel for child exploitation, a severity level 5 person felony, which the bill defines as knowingly selling or offering to sell travel services that include or facilitate travel for the purpose of any person engaging in conduct that would constitute aggravated human trafficking, sexual exploitation of a child, Internet trading in child pornography, and commercial sexual exploitation of a child if it occurred in Kansas. The bill defines “travel services” as transportation by air, sea, or ground; hotel or any lodging accommodations; package tours; or vouchers or coupons to be redeemed for future travel or accommodations for a fee, commission, or other valuable consideration.

The bill also creates the crime of Internet trading in child pornography, which is defined by incorporating certain elements of the crime of sexual exploitation of a child when the offender is 18 years of age or older and knowingly causes or permits the performance to be viewed by use of any electronic device connected to the Internet by any person other than the offender or a person depicted in the performance. The crime is a severity level 5 person felony when an offender possesses any visual depiction of a child under 18 years of age shown or heard engaging in sexually explicit conduct with intent to arouse or

satisfy the sexual desires or appeal to the prurient interest of the offender or any other person.

The conduct constitutes aggravated Internet trading in child pornography when the offender either:

- Employs, uses, persuades, induces, entices, or coerces a child under 18 years of age, or a person whom the offender believes to be a child under 18 years of age, to engage in sexually explicit conduct with the intent to promote any performance; or
- Being a parent, guardian, or other person having custody or control of a child under 18 years of age, knowingly permits such child to engage in, or assist another to engage in, sexually explicit conduct with the intent to promote any performance or with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person.

Aggravated Internet trading in child pornography is a severity level 3 person felony or an off-grid felony when the child is under 14 years of age. If the child is under 14 years of age, the provisions specifying the severity levels for attempt, conspiracy, and criminal solicitation do not apply. The bill also amends statutes governing attempt, conspiracy, and criminal solicitation of a crime to reflect this change.

In addition to the venue provided for under any other provision of law, the bill allows prosecution for these crimes to be brought in the county where the visual depiction or performance may be viewed by any person other than the offender using any electronic device connected to the Internet and is viewed by a law enforcement officer using an electronic device connected to the Internet while engaged in such officer's official duties. The Internet trading in child pornography crimes do not apply where the crimes of unlawful possession of a visual depiction of a child or unlawful transmission of a visual depiction of a child apply.

Related to the creation of these crimes, the bill adds Internet trading in child pornography and aggravated Internet trading in child pornography to the definition of "sex offense" in the capital murder statute and to the definition of "sexually violent crime" in the aggravated habitual sex offender statute and in the statute governing parole and postrelease supervision. When the child is less than 14 years of age, the bill adds aggravated Internet trading in child pornography to the statute governing crimes for which a defendant is sentenced to imprisonment for life with a mandatory minimum term of imprisonment of not less than 25 years, a statute concerning sentencing for off-grid crimes, and to the statute prohibiting direct appeal of certain cases to the Kansas Supreme Court. Additionally, the bill amends a rule governing admissibility of a witness' previous sexual conduct as evidence in certain prosecutions to apply in prosecutions of the crimes of Internet trading in child pornography and aggravated Internet trading in child pornography.

Human Trafficking

The bill amends one of the four definitions of "human trafficking" to read "recruiting, harboring, transporting, providing, or obtaining by any means, a child knowing that the person, with or without force, fraud, threat, or coercion, will be used to engage in forced labor, involuntary servitude, or sexual gratification of the defendant or another involving the exchange of anything of value." The amendment to this subsection removes the elements of the crime of human trafficking from the definition, changes "person under the age of 18 years of age" to "child," and adds the exchange of anything of value.

The bill also adds a subsection providing a new definition for the crime of aggravated human trafficking: hiring a child by giving, or offering or agreeing to give, anything of value to any person to engage in manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of another, sexual intercourse, sodomy, or any unlawful sexual act when the

offender recklessly disregards the age of the child. This definition is similar to one used to define the crime of commercial sexual exploitation of a child, which the bill modifies. For the purposes of the crime of human trafficking, “child” means a person under 18 years of age.

The bill creates an affirmative defense to prosecution for these two definitions of aggravated human trafficking for a defendant who, at the time of the violation, was under 18 and committed the violation because the defendant was subjected to human trafficking or aggravated human trafficking. It is not a defense that a victim consented or willingly participated in the forced labor, involuntary servitude, or sexual gratification of the defendant or another, or that the offender had no knowledge of the age of the victim.

The bill specifies a person who violates any of the provisions of the human trafficking statute could be prosecuted for, convicted of, and punished for commercial sexual exploitation of a child or any form of homicide. Further, in addition to any other sentence imposed, a person convicted of human trafficking will be fined between \$2,500 and \$5,000. A person convicted of aggravated human trafficking, as well as any attempt, conspiracy, or solicitation of that crime, will be fined a minimum of \$5,000. Fines collected are remitted to the Human Trafficking Victim Assistance Fund. Additionally, the court can order any person convicted to enter into and complete a suitable educational or treatment program regarding commercial sexual exploitation of a child.

The bill amends the definition of “sex offense” in the capital murder statute to add aggravated human trafficking if committed in whole or in part for the purpose of the sexual gratification of another.

Sexual Exploitation of a Child

- The bill amends the crime of sexual exploitation of a child to increase the severity level from a level 5 to a level 3 person felony when committed by: Employing, using, persuading, inducing, enticing, or coercing a child under 18 years of age, or a person who the offender believes to be a child under 18 years of age, to engage in sexually explicit conduct with the intent to promote any performance; or
- Promoting any performance that includes sexually explicit conduct by a child under 18 years of age, knowing the character and content of the performance.

Buying Sexual Relations

The bill amends the crime of buying sexual relations to provide a person convicted of this crime will be fined between \$1,200 and \$5,000. Prior law provided for a fine of \$2,500 for a first-time offense and a fine of up to \$5,000 for a second or subsequent offense. Half of all fines collected will be remitted to the Human Trafficking Victim Assistance Fund. Similarly, the bill designates half of any fine imposed for a municipal violation of buying sexual relations to be remitted to the Human Trafficking Victim Assistance Fund. Prior law provided for \$2,500 of any such fine to be remitted to that fund.

Commercial Sexual Exploitation of a Child

The bill replaces two definitions for the crime of commercial sexual exploitation of a child with one definition containing language modified from the existing definitions. The bill also increases the severity level for commercial sexual exploitation of a child from a level 5 to a level 4 person felony.

Training Regarding Trafficking

On and after July 1, 2018, the bill requires an applicant for issuance or renewal of a commercial driver’s license to complete training approved by the Attorney General in human trafficking identification and

prevention and provide satisfactory proof of such completion to the Division of Vehicles prior to such issuance or renewal. The bill requires the Attorney General, in consultation with the Director of Vehicles, to promulgate rules and regulations no later than January 1, 2019, to implement this requirement.

Additions to Sexually Violent Crimes

The bill amends the Kansas Offender Registration Act to add the crime of promoting the sale of sexual relations to the list of sexually violent crimes and specifies a person convicted of such crime is required to register for 15 years.

Expungement

The bill requires a court to order expungement of records and files if it finds the juvenile is a victim of human trafficking, aggravated human trafficking, or commercial sexual exploitation of a child; the adjudication concerned acts committed by the juvenile as a result of such victimization, including, but not limited to, acts which, if committed by an adult, would constitute a violation of disorderly conduct or selling sexual relations, and the hearing on expungement occurred on or after the date of final discharge. Additionally, the bill adds to the list of crimes for which juvenile and adult expungement is not allowed the crimes of Internet trading in child pornography and aggravated Internet trading in child pornography.

Compensation for Crime

The bill specifies provisions allowing reduction or denial of compensation from the Crime Victims Compensation Board shall not be construed to reduce or deny compensation to a victim of human trafficking or commercial sexual exploitation of a child who was 18 years or younger at the time the crime was committed and is otherwise qualified for compensation.

House Substitute for Senate Bill 42

Absconding from Supervision; Immediate Intervention; Sentencing and Placement; Oversight Committee; Required Findings Upon Removal; Fund Provisions

House Sub. for SB 42 creates and amends law related to the Kansas juvenile justice system and the changes made to the system by 2016 SB 367.

Note: House Sub. For SB 42 amends several statutory provisions that, pursuant to amendments made or new statutes created by 2016 SB 367, have not yet taken effect.

Absconding from Supervision

The bill amends the Revised Kansas Juvenile Justice Code statute requiring community-based graduated responses for technical violations of probation to state that absconding from supervision shall not be considered a technical violation of probation and to allow a court to issue a warrant after reasonable efforts to locate a juvenile who has absconded are unsuccessful. The statute governing overall case length limits (effective July 1, 2017) is amended to provide that probation term limits and overall case length limits shall be tolled during any time that a juvenile has absconded from supervision while on probation.

The statute governing failure to obey conditions of conditional release (version effective July 1, 2017) is amended to add absconding from supervision as an event allowing the supervising officer to file a report with the court describing the alleged violation and the juvenile's history of violations.

The statute governing when a juvenile may be taken into custody is amended to add absconding from supervision as an event allowing a supervising officer to request a warrant, and the statute governing issuance of warrants (version effective July 1, 2017) is amended to allow a court to issue a warrant commanding the juvenile be taken into custody if there is probable cause to believe the juvenile has absconded from supervision. The statute governing violation of conditions of probation or placement (version effective July 1, 2017) is amended to add absconding from supervision to the findings enabling a court to extend or modify the terms of probation or placement or enter another sentence.

Immediate Intervention Programs

The bill amends the statute regarding confidential data exchange for the juvenile justice system to require the Kansas Department of Corrections (KDOC) to establish and maintain a statewide searchable database containing information regarding juveniles who participate in an immediate intervention program. County and district attorneys, judges, community supervision officers, and juvenile intake and assessment workers shall have access to the database and are required to submit necessary data to the database. KDOC is required to, in consultation with the Office of Judicial Administration (OJA), adopt rules and regulations to implement the database.

The statute governing immediate intervention programs is amended to exclude any juvenile charged with a sex offense from a provision requiring the opportunity for participation in an immediate intervention program be offered to juveniles charged with a misdemeanor. The bill also specifies that participation in an immediate intervention program does not have to be offered to a juvenile who has participated in such a program for a previous misdemeanor or to a juvenile who was originally charged with a felony but had the charge amended to a misdemeanor as a result of a plea agreement.

Sentencing and Placement

The bill amends the Juvenile Code statutes governing sentencing alternatives (version effective July 1, 2017) and the placement matrix (version effective July 1, 2017) to provide that, upon a finding by the trier of fact during adjudication that a firearm was used in the commission of a felony offense by the juvenile, the judge may commit the juvenile directly to the custody of the Secretary of Corrections for placement in a juvenile correctional facility (JCF) or a youth residential facility for a term of 6 to 18 months, regardless of the risk level of the juvenile. Additionally, the court may impose a period of conditional release of up to six months, subject to graduated responses. The Secretary of Corrections or designee is required to notify the court of the juvenile's anticipated release date 21 days prior to such date. (Under the sentencing alternatives and placement matrix enacted in 2016 SB 367, placement in a JCF could be made only when the judge finds and enters into the written record that the juvenile poses a significant risk of harm to another or damage to property and the juvenile has either been adjudicated for high-level felonies or has certain prior offenses and is assessed as high-risk on a risk and needs assessment.)

The bill amends the sentencing alternatives statute (version effective July 1, 2017) to remove a three-month limit on short-term alternative placement allowed when a juvenile is adjudicated of certain sex offenses and certain other conditions are met.

The bill amends the placement matrix statute (version effective July 1, 2017) to consolidate the categories of serious offender III and serious offender IV, which carry the same risk-level requirements and JCF commitment terms, into a single serious offender III category.

The bill amends the Juvenile Code statute governing jurisdiction to remove a provision requiring the Secretary for Children and Families to address issues of abuse and neglect by parents and to prepare parents for the child's return home in cases in which a sentencing court orders the continued placement of the juvenile as a child in need of care.

Timing of Overall Case, Probation, and Detention Length Limits

The bill establishes that the provisions of the Juvenile Code statute governing overall case, probation, and detention length limits (effective July 1, 2017) applies upon disposition or 15 days after adjudication, whichever is sooner.

Juvenile Justice Oversight Committee

The bill amends the statute establishing the Kansas Juvenile Justice Oversight Committee to add two members: one youth member of the Kansas Advisory Group on Juvenile Justice and Delinquency Prevention appointed by the chair of that group, and one director of a juvenile detention facility appointed by the Attorney General. The bill also provides two additional duties for the Oversight Committee: 1) study and create a plan to address the disparate treatment of and availability of resources for juveniles with mental health needs in the juvenile justice system; and 2) review portions of juvenile justice reform that require KDOC and OJA to cooperate and make recommendations when there is no consensus between the two agencies.

Required Findings Upon Removal

The bill creates new law requiring, when a juvenile is removed from the home for the first time pursuant to the Juvenile Code, the judge to consider and make, if appropriate, the following findings: the juvenile is likely to sustain harm if not immediately removed from the home, allowing the juvenile to remain in the home is contrary to the welfare of the juvenile, or immediate placement of the juvenile is in the juvenile's best interest. The bill also requires the judge to find reasonable efforts have been made to maintain the family unit and prevent the unnecessary removal of the juvenile from the juvenile's home or an emergency exists that threatens the safety of the juvenile.

Fund Provisions

The bill amends the statute creating the Kansas Juvenile Justice Improvement Fund to replace references to the Fund with references to the "Evidence-Based Program Account of the State General Fund," and amends certain other provisions regarding this fund.

Senate Bill 50

Kansas Consumer Protection Act and Membership of the Kansas Commission on Interstate Cooperation and the Joint Committee on Special Claims Against the State

SB 50 creates an unconscionable act or practice under the Kansas Consumer Protection Act related to the unauthorized practice of law and amends law regarding membership of the Advisory Committee to the Kansas Commission on Interstate Cooperation and the Joint Committee on Special Claims Against the State.

House Substitute for Senate Bill 51

State Board of Pharmacy; Scheduling of Controlled Substance Analogs

House Sub. for SB 51 amends the definition of “controlled substance analog” and “marijuana,” expands the authority of the State Board of Pharmacy (Board) to allow greater flexibility in emergency scheduling of controlled substance analogs and new drugs, and amends the duration of temporary scheduling by the Board. The bill also adds several drugs and modifies drug classes to the schedules of controlled substances under the Uniform Controlled Substances Act (Act). Specifically, the bill makes the following changes to the Act: adds several synthetic opioids to Schedule I; updates existing synthetic cannabinoid class definitions; adds thiafentanil to Schedule II; adds cannabidiol, when comprising the sole active ingredient of a drug product approved by the federal Food and Drug Administration, to Schedule IV; and adds brivaracetam to Schedule V.

House Substitute for Senate Bill 70

Kansas Amusement Ride Act

House Sub. for SB 70 enacts law and amends the Kansas Amusement Ride Act and Amusement Ride Insurance Act by addressing and making changes related to permitting, registration, moneys collected, injury reporting, death of patrons, insurance, definitions, qualified inspectors, inspections, records, standards, testing violations, and rule and regulation authority.

House Substitute for Senate Bill 101

Sexual Assault; Sexual Assault Examinations—Exceptions to Parental Notification; Infectious Disease Testing; Crime Victims Compensation

House Sub. for SB 101 amends law concerning protective orders, notification of sexual assault examination of a minor child, infectious disease testing, and claims for compensation through the Crime Victims Compensation Board.

Protective Orders

The bill amends the law concerning protective orders to extend the provisions of the Protection from Abuse Act (PFAA) and Protection from Stalking Act (PFSA) to apply to victims of sexual assault. Specifically, the bill amends the definition of “abuse” in the PFAA to include “engaging in any sexual contact or attempted sexual contact with another person without consent or when such person is incapable of giving consent.”

The bill also amends the PFSA, renaming it the Protection from Stalking and Sexual Assault Act (PFSSAA). For the purposes of the PFSSAA, “sexual assault” is defined as:

- A nonconsensual sexual act; or
- An attempted sexual act against another by force, threat of force, or duress, or when the person is incapable of giving consent.

The bill adds “sexual assault” throughout the PFSSAA and allows the court to issue an order restraining the defendant from committing or attempting to commit a sexual assault upon the victim. The bill specifies the court may issue a protection from stalking or sexual assault order granting any one or more of the orders allowed by the PFSSAA, including orders restraining a defendant from harassing, abusing, or sexually assaulting a victim. The bill requires the order to include a statement that if such order is

violated, the violation will constitute “violation of a protective order” and a “sex offense” as defined by the Kansas Criminal Code and the accused can be prosecuted for, convicted of, and punished for such sex offense. The bill amends the crime of violation of a protective order to include knowingly violating a protection from sexual assault order, which is a class A person misdemeanor.

Senate Bill 112

Domestic Battery; Drug Paraphernalia; Burglary; Cruelty to Animals; Dog Fighting; Law Enforcement Protection Act; Expungement; Illegal Sentences; Postrelease Supervision for Persons Convicted of Sexually Violent Crimes; Custodial Interrogations

SB 112 amends law regarding crimes and criminal procedure. Specifically, it creates the crime of aggravated domestic battery and amends the crimes of domestic battery, possession of drug paraphernalia, burglary, cruelty to animals, and dog fighting. Further, it amends provisions concerning illegal sentences, postrelease supervision for persons convicted of sexually violent crimes, and expungement of arrest records. It also enacts the Law Enforcement Protection Act and provisions concerning the electronic recording of certain custodial interrogations.

Domestic Battery

The bill creates the crime of aggravated domestic battery, a severity level 7 person felony, which is defined as:

- Knowingly impeding the normal breathing or circulation of the blood by *applying pressure on the throat, neck, or chest* of a person with whom the offender is involved or has been involved in a dating relationship or a family or household member, when done in a rude, insulting, or angry manner; or
- Knowingly impeding the normal breathing or circulation of the blood by *blocking the nose or mouth* of a person with whom the offender is involved or has been involved in a dating relationship or a family or household member, when done in a rude, insulting, or angry manner.

The bill also amends the existing crime of domestic battery by adding “a person with whom the offender is involved or has been involved in a dating relationship” as a possible victim of the offense. The bill adds a definition of “dating relationship” to this section based on a definition used in the Criminal Code and the Protection from Abuse Act.

The bill amends provisions related to sentencing for domestic battery, as follows. In determining the sentence to be imposed within the limits provided for a first, second, or subsequent offense, the bill requires a court to consider information presented to the court regarding a current or prior protective order issued against the offender. The bill defines “protective order” for these purposes. The bill also removes language allowing the Kansas Department of Corrections to order that certain offenders not be required to undergo domestic violence offender assessments.

Sentencing for Possession of Drug Paraphernalia

The bill reduces the severity level for unlawful possession of drug paraphernalia from a class A to a class B nonperson misdemeanor when the drug paraphernalia was used to cultivate fewer than five marijuana plants or used to store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body.

Sentencing for Burglary

The bill changes burglary of a dwelling with intent to commit a felony, theft, or sexually motivated crime therein to a severity level 7 *person* felony from a severity level 7 *nonperson* felony.

Cruelty to Animals

The bill amends the humane killing exclusion from the crime of cruelty to animals to remove references to “pound,” “incorporated humane society,” and “the operator of” an animal shelter. In provisions allowing an animal to be taken into custody and cared for or treated, the bill either removes references to “incorporated humane society” or replaces such references with “animal shelter.” A requirement for notice to an owner or custodian is expanded from cases in which the animal is placed in the care of an animal shelter to all cases, and written notification is required.

The requirement that the board of county commissioners in the county where the animal was taken into custody establish procedures to allow an animal shelter to petition the district court to be allowed to place the animal for adoption or euthanize the animal is replaced with a provision allowing the law enforcement agency, district attorney’s office, county prosecutor, veterinarian, or animal shelter to petition the district court in the county in which the animal was taken into custody to transfer ownership of the animal. The bill removes a provision requiring the board of county commissioners to review the cost of care and treatment being charged by the animal shelter maintaining the animal.

A provision prohibiting an animal from being returned to or allowed to remain with a person adjudicated guilty of this crime is amended to remove a requirement that the court first be satisfied an animal owned or possessed by the person will be subjected to such crime in the future. A reference to “duly incorporated humane society” in this provision is replaced with “animal shelter.” “Animal shelter” is defined to mean the same as in the Kansas Pet Animal Act.

Dog Fighting

The bill amends a provision regarding the placement of a dog taken into custody to replace a reference to “duly incorporated humane society” with “animal shelter.” “Animal shelter” is defined to mean the same as in the Kansas Pet Animal Act.

The requirement that the board of county commissioners in the county where the animal was taken into custody establish procedures to allow an animal shelter to petition the district court to be allowed to place the animal for adoption or euthanize the animal is replaced with a provision allowing the law enforcement agency, district attorney’s office, county prosecutor, veterinarian, or animal shelter to petition the district court in the county in which the animal was taken into custody to transfer ownership of the animal. The bill removes a provision requiring the board of county commissioners to review the cost of care and treatment being charged by the animal shelter maintaining the animal.

A provision requiring costs be paid by the county where the dog was taken into custody if no conviction results adds law enforcement agencies and veterinarians to the list of entities entitled to payment for expenses incurred for the care, treatment, and boarding of a dog.

Expungement of Arrest Records

If a person has been arrested as a result of mistaken identity or as a result of another person using identifying information of the named person and the charge against the named person is dismissed or not prosecuted, the bill requires the prosecuting attorney or other judicial officer who ordered the dismissal or declined to prosecute to provide notice to the court of such action and petition the district court for the

expungement of such arrest record. Further, the bill requires the court to order the arrest record and any subsequent court proceedings expunged and purged from all applicable state and federal systems.

The bill defines “mistaken identity” as the erroneous arrest of a person for a crime as a result of misidentification by a witness or law enforcement, confusion on the part of a witness or law enforcement as to the identity of a person who committed the crime, misinformation provided to law enforcement as to the identity of a person who committed the crime, or some other mistake on the part of a witness or law enforcement as to the identity of the person who committed the crime. The bill excludes from the definition of “mistaken identity” any situation in which an arrestee intentionally provides false information to law enforcement officials in an attempt to conceal such person’s identity.

The bill allows any person who may have relevant information about the petitioner to testify at the hearing on such petition and allows the court to inquire into the background of the petitioner.

When a court orders expungement of arrest records as described above, the bill requires the order to state the information required in the petition and the grounds for expungement. Additionally, the bill requires the order to direct the Kansas Bureau of Investigation (KBI) to purge the arrest information from the Criminal Justice Information System central repository and all applicable state and federal databases. The clerk of the court must send a certified copy of the order to the KBI, which will carry out the order and notify the Federal Bureau of Investigation, the Secretary of Corrections, and any other criminal justice agency that may have a record of the arrest. If an order of expungement is entered, the bill provides the person eligible for mandatory expungement as described above is treated as not having been arrested.

Illegal Sentences

The right to a hearing regarding an illegal sentence is made inapplicable if the motion, files, and records of the case conclusively show the defendant is entitled to no relief. The bill also defines “illegal sentence” and specifies a sentence does not fall within that definition due to a change in the law occurring after the sentence is pronounced.

Postrelease Supervision for Persons Convicted of Sexually Violent Crimes

The bill clarifies that lifetime postrelease supervision is to be imposed on any offender sentenced to imprisonment for a sexually violent crime committed on or after July 1, 2006, if the offender was 18 years of age or older when the crime was committed. It further establishes a mandatory period of 60 months postrelease supervision, plus good time and program credit earned and retained, for any offender sentenced to imprisonment for a sexually violent crime committed on or after the bill’s effective date if the offender was under 18 years of age when the crime was committed. Prior statute provided for lifetime postrelease supervision for any person convicted of a sexually violent crime committed on or after July 1, 2006, regardless of age.

The bill also clarifies that a separate provision regarding postrelease supervision for persons sentenced to a term of imprisonment for sexually violent crimes applies only to such crimes committed on or after July 1, 1993, but prior to July 1, 2006.

Law Enforcement Protection Act

The bill enacts the Law Enforcement Protection Act and creates a special sentencing rule with enhanced penalties if a trier of fact finds beyond a reasonable doubt that an offender committed a nondrug felony offense (or the offender committed an attempt or conspiracy to commit such offense) against a law

enforcement officer while the officer was performing the officer's duty or solely due to the officer's status as a law enforcement officer. The special sentencing rule is applied as follows:

- For felonies levels 2 through 10, sentencing is enhanced by 1 level;
- For level 1 felonies:
 - The minimum sentence is life in prison;
 - The offender is not eligible for a sentence modification or probation;
 - The offender cannot be released on parole before serving 25 years of the sentence;
 - The offender is not eligible for good time credit; and
 - No other sentence is permitted.

If an offender is subject to a minimum presumptive sentence due to criminal history, the minimum sentence of 25 years does not apply. Instead, the longer minimum sentence applies. The sentence imposed is not considered a departure from the sentencing grid and cannot be appealed. Further, the enhancements do not apply to crimes where the factual aspect concerning a law enforcement officer is a statutory element of the offense.

Finally, the bill defines "law enforcement officer" by reference to two of the three categories included in the definition provided for the term in the criminal code definitions section. This definition includes any person who by virtue of such person's office or public employment is vested by law with the duty to maintain public order or to make arrests for crimes, and any university or campus police officer.

Policies for the Electronic Recording of Custodial Interrogations

Kansas law enforcement agencies must adopt a detailed, written policy concerning the electronic recording of custodial interrogations conducted at a place of detention and to implement such policy on or before July 1, 2018. In developing such policy, local law enforcement agencies must collaborate with the county or district attorney in the appropriate jurisdiction regarding its contents. The policy must require electronic recording of the entirety of a custodial interrogation that concerns a homicide or felony sex offense, as well as the making and signing of a statement during the course of such interrogation. The policy also must include retention and storage requirements and a statement of exceptions in some circumstances, such as equipment malfunction or inadvertent failure to operate the recording equipment properly. The bill requires the policy to be available to all officers and for public inspection during normal business hours. During trial, the bill allows for officers to be questioned pursuant to the rules of evidence regarding any violation of such a policy. Every electronic recording of any statement is confidential and exempt from the Kansas Open Records Act.

House Bill 2041

Courts—Judicial Surcharge; Collection of Court Debts; Driver's License Reinstatement Fee and Distribution

HB 2041 amends laws related to the court.

Judicial Surcharge; Collection of Court Debts

The bill extends the sunset provision for judicial surcharges on a number of docket fees until June 30, 2019. The bill makes technical corrections and reconciles amendments related to expungements made in the 2016 session. The bill amends law related to the collection of debts owed to courts. The bill requires the cost of collection of debts owed to courts or restitution be paid by the responsible party as an additional court cost in all cases where the party fails to pay any debts owed to courts or restitution and the court contracts with an agent to collect the debt or restitution.

Reinstatement Fees

The bill amends statutes regarding the reinstatement fee for failure to comply with a traffic citation and its distribution. Effective July 1, 2018, the bill increases the reinstatement fee for each charge from \$59 to \$100.

Senate Substitute for House Bill 2053 Crisis Intervention Act

Senate Sub. for HB 2053 creates the Crisis Intervention Act (Act) and amends law related to mental health to reflect the provisions of the Act.

Definitions

For purposes of the Act, the bill defines “crisis intervention center” to mean an entity licensed by the Kansas Department for Aging and Disability Services that is open 24 hours a day, 365 days a year, equipped to serve voluntary and involuntary individuals in crisis due to mental illness, substance abuse, or a co-occurring condition, and that uses certified peer specialists. “Crisis intervention center service area” is defined as the counties to which the crisis intervention center has agreed to provide service. The bill also defines numerous other terms.

Custody and Transportation by Law Enforcement Officer

The bill allows any law enforcement officer who takes a person into custody under the Care and Treatment Act for Mentally Ill Persons or the Care and Treatment Act for Persons with an Alcohol or Substance Abuse Problem to transport such person to a center if the LEO is in a crisis intervention center service area. The center cannot refuse to accept any person brought by an LEO for evaluation if the LEO’s jurisdiction is in the center’s service area. If the LEO is not in a center service area or chooses not to transport the person to a center, the LEO must follow the procedures under the Care and Treatment Act for Persons with an Alcohol or Substance Abuse Problem or the Care and Treatment Act for Mentally Ill Persons.

Admission and Detention Upon Application by Law Enforcement Officer or Adult

The Act specifies the procedure for admission and detention upon application by a law enforcement officer or by an adult.

Evaluation, Court Review, Discharge, and Further Placement

The head of the center is required to evaluate a person admitted under the Act within four hours of admission to determine whether the person is likely to be a mentally ill person or a person with an alcohol and substance abuse problem subject to involuntary commitment under the care and treatment acts for such persons and whether, due to such problem or condition, the person is likely to cause harm to self or others if not immediately detained. The head of the center is required to inquire whether the person has a wellness recovery action plan or psychiatric advance directive.

The Act requires evaluation of a person admitted under the Act by a behavioral health professional not later than 23 hours after admission and again not later than 48 hours after admission to determine whether the person continues to meet the criteria described in the paragraph above. The 23-hour evaluation must be conducted by a different professional than the professional who conducted the initial evaluation.

Within 48 hours of admission, if the head of the center determines the person continues to meet the

criteria above, the head of the center is required to file an affidavit to that effect for review by the district court in the county where the center is located.

The head of the center is required to discharge a person admitted under the Act at any time the person no longer meets the criteria described above, and not later than 72 hours after admission, unless the head of the center determines the person continues to meet the criteria described above, in which case the head of the center is required to immediately file a petition under the appropriate care and treatment act and find appropriate placement for the person (including community hospitals equipped to take involuntary commitments or the designated state hospital). If the 72-hour period ends after 5 p.m., the Act requires such petition be filed by the close of business of the first day thereafter that the district court is open.

The center is required to make reasonable accommodations for the person's transportation upon discharge from the center.

Requirements of the Head of the Center

The Act provides for certain requirements for the Head of the Center when a person is involuntarily committed under this Act.

Medications and Treatment

The Act requires medications and other treatments be prescribed, ordered, and administered only in conformity with accepted clinical practice. Medications can be administered only by written order of a physician or by verbal order noted in the patient's records and subsequently signed by the physician, and the attending physician is required to regularly review the drug regimen and monitor any symptoms or side effects. Prescriptions for psychotropic medications can be written for no longer than 30 days but can be renewed.

During treatment, the responsible physician or psychologist (or designee) is required to reasonably consult with the patient or patient's legal guardian and give consideration to the views expressed by such persons regarding treatment and any alternatives, including views in a wellness recovery action plan or psychiatric advance directive. No medication or other treatment can be administered to any voluntary patient without the consent of such patient or the patient's legal guardian.

The Act requires consent for medical or surgical treatments not intended primarily to treat a patient's mental disorder be obtained in accordance with applicable law.

If a patient objects to taking any medication prescribed for psychiatric treatment, and after full explanation of the benefits and risks of such medication such objection continues, the medication can be administered over the patient's objection, with the objection recorded in the patient's medical record.

The administration of experimental medication is prohibited without the patient's written consent.

Restraints or Seclusion

Restraints or seclusion is prohibited unless the head of the center or a physician or psychologist determines such measures are necessary to prevent immediate substantial bodily injury to the patient or others and alternative methods are not sufficient to accomplish this purpose. The Act lists additional requirements for the use of restraints or seclusion.

Rights of Patients; Penalty for Deprivation of Rights

The bill includes in the Act a list of rights of patients. The head of a center can, for good cause only, restrict certain of those rights. The remaining rights cannot be restricted by the head of a center under any circumstances. Each center is required to adopt policies governing patient conduct that are consistent with the above provisions. Any person willfully depriving any patient of the rights listed above, except for the restriction of rights as permitted by the Act or in accordance with a properly obtained court order, is guilty of a class C misdemeanor.

Records

Any district court, treatment, or medical records of a person admitted to a center under the Act that are in the possession of a district court or center are privileged and not subject to disclosure, except as provided under the Care and Treatment Act for Mentally Ill Persons.

Immunity and Criminal Making of a Report

The Act provides immunity from civil and criminal liability for acting or declining to act pursuant to the Act for any person, law enforcement agency, governing body, center, or community mental health center or personnel. It is a class A misdemeanor to, for corrupt consideration, advantage, or malice, make, join in making, or advise the making of a false petition, report, or order provided for in the Act.

House Bill 2054 Kansas Sentencing Commission—Data Sharing

HB 2054 amends law related to the Kansas Sentencing Commission (Commission) to require the Commission to gather data and information from state agencies to carry out its duties and functions. It also requires state agencies to provide data or information requested by the Commission for the above purpose, unless otherwise prohibited by law. “State agency” is defined for purposes of this provision.

House Bill 2085 Driving Under the Influence; Ignition Interlock Devices; Expungement

HB 2085 amends law regarding ignition interlock devices to require every person who has an ignition interlock device installed to complete the ignition interlock device program pursuant to rule and regulations adopted by the Secretary of Revenue. An approved service provider must provide proof of completion to the Division of Vehicles before the person’s driving privileges are fully reinstated.

The bill also amends statutes governing expungements in municipal and district courts to state that provisions regarding expungement of violations of driving under the influence (DUI) or test refusal apply to all violations committed on or after July 1, 2006, except that the district court expungement provision for a second or subsequent violation does not apply to violations committed on or after July 1, 2014, but prior to July 1, 2015.

House Bill 2092 Probation Revocation; Disclosure of Probable Cause Affidavits; Sentencing— Capital Crimes; Mandatory Minimums; Intellectual Disability; Juvenile Adjudications—Decay; Grand Juries—Petitions; Appeal

HB 2092 amends law related to probation revocation, public disclosure of probable cause affidavits,

mandatory minimum sentences, sentencing for capital crimes for intellectually disabled persons, decay of juvenile adjudications, and appeal of petitions for grand juries.

Probation Revocation

The bill allows a court to revoke probation, assignment to a community corrections program, suspension of a sentence, or nonprison sanction of an offender without having previously imposed an intermediate sanction if such probation, assignment, suspension, or sanction was originally granted as a result of a dispositional departure.

Disclosure of Probable Cause Affidavits

The bill amends law regarding the disclosure to the public of affidavits or sworn testimony underlying an arrest warrant to clarify the timing of notification to the defendant of a request for disclosure. Specifically, the bill prescribes that such notice shall be provided upon entry of appearance by an attorney on behalf of the defendant or upon indication by the defendant to the court that the defendant will represent the defendant's self.

Mandatory Minimum Sentences

The bill amends law concerning mandatory minimum terms of imprisonment for persons who receive life sentences. In the statutes imposing the mandatory minimum sentence, the bill specifies those provisions shall not apply if, based on the defendant's criminal history classification, the defendant would be subject to presumptive imprisonment and the sentencing range for a severity level 1 crime is greater than the mandatory minimum sentence. The bill clarifies that, in such case, the defendant shall be required to serve a mandatory minimum sentence equal to the sentence established for a severity level 1 crime. Additionally, the defendant shall not be eligible for parole prior to serving such mandatory minimum sentence and prohibits such mandatory minimum sentence from being reduced by the application of good time credits. No other sentence shall be permitted.

Sentencing for Persons with Intellectual Disability

The bill amends the statute governing sentencing for a person with an intellectual disability who is convicted of the crime of capital murder or first degree premeditated murder. Specifically, the bill clarifies that the continuing prohibition in this statute against sentencing such person to a "mandatory term of imprisonment" means imposing a sentence under the "Hard 50" statute and the accompanying statutes setting forth the aggravating and mitigating factors used in imposing this sentence.

Juvenile Adjudication Decay

The bill amends statutes governing the determination of criminal history by adding that no juvenile adjudication for an offense that would be a nondrug severity level 5 through level 10 felony, drug felony, nongrid felony, or misdemeanor if committed by an adult will be considered and scored if the current crime was committed at least five years after the date of the prior adjudication and the offender has no new adjudications or convictions during that period.

Appeal of Grand Jury Petitions

The bill amends the law concerning grand juries summoned by petition. The bill provides that, if a grand jury is not summoned because of a finding the petition, which is substantially in the form required by law on its face, is not in proper form, the person who filed the petition and whose name, address, and phone number appear on the face of each petition shall have the right to appeal the decision to not summon a grand jury as a final judgment to the Kansas Court of Appeals.

House Bill 2217

Opioid Antagonists

HB 2217 enacts new law and amends the Kansas Pharmacy Act to create standards governing the use and administration of emergency opioid antagonists approved by the U.S. Food and Drug Administration to inhibit the effects of opioids and for the treatment of an opioid overdose. The bill requires the Board of Pharmacy to issue a statewide opioid antagonist protocol, define applicable terms, establish educational requirements for the use of opioid antagonists, and provide protection from civil and criminal liability for individuals acting in good faith and with reasonable care in administering the opioid antagonist. The Board of Pharmacy is required to adopt rules and regulations necessary to implement the provisions of the bill prior to January 1, 2018.

House Bill 2301

Open Records Exceptions; Juror Information; Procedure and Justifications for Closed or Executive Meetings

HB 2301 amends law related to public records and public meetings. The bill amends law within the Kansas Code of Criminal Procedure relating to trial jurors. The bill removes addresses of prospective jurors from the information included in the list of prospective jurors filed as a public record with the clerk of the court.

CHAPTER I: THE BASICS OF THE SENTENCING GUIDELINES

Sentencing provisions in effect at the time of the commission of the crime control the sentence for the offense of conviction. Substantive amendments that impact the sentence of an offender are not applied retroactively unless the statutory language clearly indicates the intent to apply the changes retroactively.

SENTENCING CONSIDERATIONS

The sentencing court should consider all available alternatives in determining the appropriate sentence for each offender. The sentencing guidelines seek to establish equity among like offenders in typical case scenarios. Rehabilitative measures are still an integral part of the corrections process, and criminal justice professionals will continue their efforts in reestablishing offenders within communities. The guidelines do not prohibit sentencing courts from departing from the prescribed sentence in atypical cases, but departures are only legislatively authorized when the sentencing court properly follows statutory departure procedures. K.S.A. 2017 Supp. 21-6802.

SENTENCING GUIDELINES AND GRIDS

The Kansas Sentencing Guidelines Act (KSGA) became effective July 1, 1993. K.S.A. 21-4701 *et seq.* The revised KSGA may be found at K.S.A. 2017 Supp. 21-6801 *et seq.* The KSGA provides for determinate sentencing based on sentencing charts or “grids.” Each sentencing grid is a two-dimensional crime severity and criminal history classification tool. The grid’s vertical axis is the crime severity scale which classifies current crimes of conviction. The grid’s horizontal axis is the criminal history scale which classifies criminal histories. The provisions for the nondrug crime grid are found in K.S.A. 2017 Supp. 21-6804. The provisions for the drug crime grid are found in K.S.A. 2017 Supp. 21-6805. The presumptive sentence is determined by two factors: the severity level of the current crime of conviction and the offender’s criminal history. The grid block at the intersection of the severity level of the crime of conviction and the offender’s criminal history score provides the presumed sentencing range, and includes prescribed aggravated, standard and mitigated sentences in months. Each grid also contains a dispositional line: grid blocks above the line presume a sentence of imprisonment; grid blocks below the line presume a sentence of probation. Each grid also includes border blocks or boxes, which are above the dispositional line and therefore presume imprisonment, but which provide that the court may impose an optional nonprison sentence, i.e., probation. See K.S.A. 2017 Supp. 21-6804 and K.S.A. 2017 Supp. 21-6805. The grids can be found in Appendix E, and are the final two pages of this Manual.

DRUG GRID AND NONDRUG GRID

There are two grids used for sentencing of felony convictions. The nondrug grid is used for sentencing of all felony crimes other than drug grid crimes.

The drug grid is used for sentencing of all drug crimes under article 57 of chapter 21 of the Kansas Statutes Annotated, except for K.S.A. 2017 Supp. 21-5705(d)(6)(B), 21-5707, 21-5708, 21-5713, 21-5714 and subsections of 21-5710(3)(A) and (4)(B), which are sentenced pursuant to the nondrug grid. Prior versions of the act were found in K.S.A. 65-4101 *et seq.*, then briefly in K.S.A. 21-36a01 *et seq.*, before being transferred to their current location in K.S.A. 2017 Supp. 21-5701 *et seq.*

The criminal history categories make up the horizontal axis and the crime severity levels make up the vertical axis. Each grid contains nine criminal history categories. The drug grid contains five severity levels while the nondrug grid contains ten severity levels. A thick, black dispositional line cuts across both grids. Above the dispositional line the grid blocks are designated as presumptive prison sentences. Below the dispositional line are shaded grid blocks, which are designated as presumptive probation sentences.

The grids also contain blocks that may have lines passing through them, or, in this manual, darker shading, which are referred to as “border boxes.” The nondrug grid contains three border boxes, in levels 5-H, 5-I and 6-G. The drug grid contains seven border boxes in levels 4-E, 4-F, 4-G, 4-H, 4-I, 5-C and 5-D. See K.S.A. 2017 Supp. 21-6804 and 21-6805. The court has the power to grant border box probation without departing from the grid (which otherwise would require a finding of substantial and compelling reasons) if the court makes the following findings on the record: (1) An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and (2) the recommended treatment program is available and the offender can be admitted to such program within a reasonable period of time; or (3) the nonprison sanction will serve community safety interests by promoting offender reformation. K.S.A. 2017 Supp. 21-6804(q).

GRID BLOCKS

Within each grid block are three numbers, representing months of imprisonment. The three numbers provide the sentencing court with a range for sentencing. The sentencing court has discretion to sentence at any place within the range. The middle number in the grid block is the standard number and is intended to be the appropriate sentence for typical cases. The upper and lower numbers should be used for cases involving aggravating or mitigating factors insufficient to warrant a departure. See K.S.A. 2017 Supp. 21-6804 and 21-6805.

GENERAL RULES FOR DETERMINING SEVERITY LEVELS

The severity levels range from severity level 1 to severity level 10 on the nondrug grid. Level 1 is used to categorize the most severe crimes and level 10 is used to categorize the least severe crimes. Crimes listed within each level are considered relatively equal in severity. K.S.A. 2017 Supp. 21-6807(a).

The crime severity scale contained in the sentencing guidelines grid for drug crimes consisted of four levels of crimes between July 1, 1993 and July 1, 2012. On and after July 1, 2012, there are five levels of drug crimes. Crimes listed within each level are also considered relatively equal in severity. Level 1 is used to categorize the most severe crimes and level 5 is used to categorize the least severe crimes. K.S.A. 2017 Supp. 21-6808(a).

The following provisions shall be applicable with regard to ranking offenses according to the crime severity scale:

- The sentencing court will designate the appropriate severity level if it is not provided by statute. When considering an unranked offense in relation to the crime severity scale, the sentencing court should refer to comparable offenses on the crime severity scale. K.S.A. 2017 Supp. 21-6807(c)(1);
- Except for off-grid felony crimes, which are classified as person felonies, any felony crimes omitted from the crime severity scale shall be considered nonperson felonies. K.S.A. 2017 Supp. 21-6807(c)(2); and

- All unclassified felonies shall be scored as level 10 nonperson crimes. K.S.A. 2017 Supp. 21-6807(c)(3).

All felony crimes, with the exception of off-grid crimes and nongrid crimes, should be categorized in one or more of the crime severity levels. The severity level designation of each felony crime is included in the statutory definition of the crime. Some crimes include a broad range of conduct. In such circumstances, there may be a different severity level designated for violations of different subsections of the statute. All felonies and misdemeanors are listed in Appendix D of this Manual numerically by statute number.

OFF-GRID CRIMES

Off-grid offenses, by definition, are not subject to the classifications of the KSGA. Off-grid crimes include the most serious of criminal offenses:

- Capital murder (K.S.A. 2017 Supp. 21-5401),
- Murder in the first degree (K.S.A. 2017 Supp. 21-5402),
- Treason (K.S.A. 2017 Supp. 21-5901),
- Terrorism (K.S.A. 2017 Supp. 21-5422),
- Illegal use of Weapons of Mass Destruction (K.S.A. 2017 Supp. 21-5422) and
- Jessica's Law sex offenses involving victims less than 14 years of age and offenders 18 years of age or older. (K.S.A. 2017 Supp. 21-6627)

For such crimes, the term of imprisonment shall be imprisonment for life. K.S.A. 2017 Supp. 21-6806. However, such a life sentence does not necessarily mean that the offender will remain imprisoned for the remainder of the offender's life. Offenders who commit off-grid crimes and are released from prison are placed on supervised parole.

Off-grid crimes are classified as person felonies. K.S.A. 2017 Supp. 21-6807(c)(2).

CAPITAL MURDER

Offenders who commit capital murder may be sentenced to death pursuant to K.S.A. 2017 Supp. 21-6617. Offenders who are not sentenced to death are sentenced to imprisonment for life without the possibility of parole.

MANDATORY MINIMUMS

Generally, an offender sentenced for an off-grid crime will become eligible for parole after serving a mandatory minimum term of years in confinement. The exceptions are for aggravated habitual sex offenders and capital murder, which carry life sentences without the possibility of parole. Good time credit shall not apply to any mandatory minimum sentences for off-grid felonies.

Attempted Capital Murder

Offenders who are convicted of attempt to commit capital murder shall be sentenced to imprisonment for life, and shall not be eligible for parole prior to serving either 25 years' imprisonment, or the offender's sentence on the sentencing grid, whichever is greater. K.S.A. 2017 Supp. 21-6620(a)(2).

Premeditated First Degree Murder

For premeditated murder (K.S.A. 2017 Supp. 21-5402(a)(1)) committed on and after July 1, 2014, an offender convicted of premeditated first degree murder shall be eligible for parole after serving 50 years' imprisonment unless the sentencing judge finds substantial and compelling reasons to impose a lesser sentence after a review of mitigating circumstances. In that case, the offender shall serve 25 years pursuant before becoming eligible for parole. See K.S.A. 2017 Supp. 21-6620(c) and 21-6623. The aforementioned mandatory minimum sentences shall not apply if the offender's sentencing grid sentence is greater. Under such circumstances, the mandatory minimum shall equal the grid sentence. K.S.A. 2017 Supp. 21-6620(c).

For crimes committed on and after September 6, 2013, the provisions of K.S.A. 2017 Supp. 21-6620(d) shall apply.

For crimes committed prior to September 6, 2013, the provisions of K.S.A. 2017 Supp. 21-6620(e) shall apply.

Felony Murder

Offenders who are convicted of felony murder in the first degree (K.S.A. 2017 Supp. 21-5402(a)(2)) shall be sentenced to imprisonment for life, and shall not be eligible for parole prior to serving either 25 years' imprisonment, or the offender's sentence on the sentencing grid, whichever is greater. K.S.A. 2017 Supp. 21-6620(b)(2).

Other Off-Grid Offenses

Off-grid offenses other than those otherwise specified in statute carry terms of life imprisonment with eligibility for parole only after serving 15 years for crimes committed after July 1, 1993 but prior to July 1, 1999, and 20 years for crimes committed on or after July 1, 1999. K.S.A. 2017 Supp. 22-3717(b)(3).

Jessica's Law Sex Offenses

In 2006, Kansas' version of Jessica's Law was enacted and designated certain sex offenses involving victims less than 14 years of age and offenders 18 years of age or older as off-grid felonies. If an offender is convicted of one of these off-grid sex offenses, the sentence shall be imprisonment for life pursuant to with a mandatory minimum term of imprisonment of 25 years before parole eligibility on the first such sex offense, or a mandatory minimum term of 40 years on a second such offense. K.S.A. 2017 Supp. 21-6627.

Where a mandatory sentence of 25 or 40 years could be imposed, such sentence will not be imposed if the offender's criminal history would result in a guidelines sentence in excess of 300 or 480 months, respectively. In that case, the mandatory minimum will be the sentence as provided by the guidelines grid. K.S.A. 2017 Supp. 21-6627(b)(2)(B).

When the court finds substantial and compelling reasons to impose a downward departure, the court may impose the guidelines sentence in lieu of the mandatory minimum sentence. K.S.A. 2017 Supp. 21-6627(d)(1).

Once a " 'sentence becomes a guidelines sentence, the district court is free to depart from the sentencing grid if it states on the record findings of fact and reasons justifying a departure that are supported by evidence in the record and are substantial and compelling.' " *State v. Spencer*, 291 Kan. at 803, 248 P.3d at 263 (2011) See also *State v. Gracey*, 288 Kan. at 259, 200 P.3d 1275 (2009).

Upon release from imprisonment, offenders convicted of a crime under Jessica's Law will be subject to electronic monitoring for the remainder of the person's life and shall reimburse the state for all or part of the cost of such monitoring. K.S.A. 2017 Supp. 22-3717(u) and (v).

Juvenile Offenders

The death penalty and the sentence of life imprisonment without parole do not apply to juveniles who were under the age of 18 at the time they committed capital murder. K.S.A. 2017 Supp. 21-6618. Juveniles who are prosecuted as adults may be subject to a mandatory minimum term of imprisonment. K.S.A. 2017 Supp. 21-6621.

In *State v. Dull*, 302 Kan. 32, 351 P.3d 641 (2015) *cert. denied* 136 S.Ct. 1364 (2017), the Kansas Supreme Court found that mandatory lifetime postrelease supervision is always cruel and unusual punishment for juveniles, in part because juveniles' diminished culpability, immaturity, recklessness, poor decision-making skills, and lower risks of recidivism all diminish the punishment goals of lifetime supervision. As a result, the legislature has mandated a 60 month period of postrelease for an offender sentenced to prison for a sexually violent crime if the offender was under the age of 18 when the crime was committed. K.S.A. 2017 Supp. 22-3717(d)(1)(G).

Offenders with Intellectual Disability

Offenders who are convicted of capital murder or premeditated first degree murder who are determined to have an intellectual disability may not be sentenced to a death, life without parole or a mandatory minimum sentence. K.S.A. 2017 Supp. 21-6622.

NONGRID CRIMES

Certain felony offenses are classified as nongrid offenses, (not to be confused with off-grid offenses) which are not assigned a severity level and are not subject to punishment pursuant to the sentencing grid. These offenses each contain specific penalties and other provisions within their respective statutes. Each of these crimes has a corresponding special sentencing rule that must be checked on the Special Rules Supplemental Page of the Journal Entry and Presentence Investigation Report when applicable.

These crimes are:

- felony driving under the influence, K.S.A. 8-1567, (Special Rule #6)
- felony test refusal, K.S.A. 2017 Supp. 8-1025, (Special Rule #39)*
- felony domestic battery, K.S.A. 2017 Supp. 21-5414, (Special Rule #8)
- animal cruelty, K.S.A. 2017 Supp. 21-6412 and harming or killing certain dogs, K.S.A. 2017 Supp. 21-6416. (Special Rule #21)

**K.S.A. 8-1025 was ruled unconstitutional by State v. Ryce, 306 Kan. 682, 396 P.3d 711 (2017). Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2017 Supp. 21-6810(d)(8).*

Criminal history, except as provided in each specific statute for determining whether the crime is the second, third, fourth or subsequent such offense, is not relevant to the punishment for nongrid offenses.

DUI

Certain convictions, including diversions, shall be counted in determining whether the DUI conviction is the second, third, fourth or greater. These convictions include:

- DUI occurring on or after July 1, 2001,
- test refusal, K.S.A. 8-1025,*

- driving a commercial motor vehicle under the influence, K.S.A. 8-2,144,
- operating a vessel under the influence of alcohol or drugs, K.S.A. 32-1131,
- involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 21-3442, prior to its repeal, or K.S.A. 2017 Supp. 21-5405(a)(3),
- aggravated vehicular homicide, K.S.A. 21-3405a, prior to its repeal, or vehicular battery, K.S.A. 21-3405b, prior to its repeal, if the crime was committed while committing a violation of K.S.A. 8-1567, and
- violation of an ordinance of any city, military justice code or resolution of any county which prohibits DUI. K.S.A. 8-1567(i).

**K.S.A. 8-1025 was ruled unconstitutional by State v. Ryce, 306 Kan. 682, 396 P.3d 711 (2017). Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2017 Supp. 21-6810(d)(8).*

TEST REFUSAL

NOTE: Test refusal, K.S.A. 8-1025, was ruled unconstitutional in *State v. Ryce*, 306 Kan. 682 (2017). Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2017 Supp. 21-6810(d)(8).

DOMESTIC BATTERY

For the purpose of determining whether the domestic battery conviction is a first, second, third or subsequent conviction, only convictions and diversions within the previous 5 years shall be taken into account. K.S.A. 2017 Supp. 21-5414(c)(2).

ANTICIPATORY CRIMES

ATTEMPT

Off-grid Crimes

An attempt to commit an off-grid felony shall be ranked at nondrug severity level 1, with the following exceptions from K.S.A. 2017 Supp. 21-5301:

- 1) Terrorism, K.S.A. 2017 Supp. 21-5421;
- 2) Illegal use of weapons of mass destruction, K.S.A. 2017 Supp. 21-5421;
- 3) Capital murder, K.S.A. 2017 Supp. 21-5401;
- 4) An attempt to commit the following offenses, if the offender is 18 years of age or older:
 - A) Rape, K.S.A. 2017 Supp. 21-5503(a)(3);
 - B) Aggravated indecent liberties with a child, K.S.A. 2017 Supp. 21-5506(b)(3); and
 - C) Aggravated criminal sodomy, K.S.A. 2017 Supp. 21-5504(b)(1) or (b)(2);
- 5) An attempt to commit the following offenses, when the offender is 18 years of age or older and the victim is less than 14 years of age, shall remain off-grid felonies (i.e. the reduction of severity level shall not apply):
 - A) Aggravated human trafficking, K.S.A. 2017 Supp. 21-5426(b);
 - B) Commercial sexual exploitation of a child, K.S.A. 2017 Supp. 21-6422; and
 - C) Sexual exploitation of a child, K.S.A. 2017 Supp. 21-5510(a)(1) or (a)(4).

Nondrug Crimes

An attempt to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level

for an attempt to commit a nondrug felony shall be a severity level 10. K.S.A. 2017 Supp. 21-5301(c)(1).

Drug Crimes

An attempt to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term by six months, except that this does not apply in cases involving an attempt to manufacture a controlled substance under K.S.A. 2017 Supp. 21-5703. K.S.A. 2017 Supp. 21-5301(d).

Misdemeanors

An attempt to commit a class A person misdemeanor is a class B person misdemeanor. K.S.A. 2017 Supp. 21-5301(e). An attempt to commit a class A nonperson misdemeanor is a class B nonperson misdemeanor. K.S.A. 2017 Supp. 21-5301(e). An attempt to commit a class B or C misdemeanor is a class C misdemeanor. K.S.A. 2017 Supp. 21-5301(f).

Crimes where Attempt is an Element

There are certain crimes where an attempt constitutes the completed crime. In such crimes, the statutory definition will include an attempt as a means, or alternate means, of completing the crime. For example, DUI, K.S.A. 8-1567, says “No person shall operate or attempt to operate any vehicle...” In such cases, the completed crime may be charged based on the conduct described, which will not be subject to the reduction in severity level. Other such instances include K.S.A. 2017 Supp. 21-5428 - blackmail, 21-5508 - indecent solicitation of a child, and 21-5909 - witness intimidation.

CONSPIRACY

Off-grid Crimes

Conspiracy to commit an off-grid felony shall be ranked at nondrug severity level 2, with the following exceptions from K.S.A. 2017 Supp. 21-5302:

- 1) Terrorism, K.S.A. 2017 Supp. 21-5421;
- 2) Illegal use of weapons of mass destruction, K.S.A. 2017 Supp. 21-5421;
- 3) Violations of the Kansas racketeer influenced and corrupt organization act, K.S.A. 2017 Supp. 21-6329;
- 4) An attempt to commit the following offenses, if the offender is 18 years of age or older:
 - A) Rape, K.S.A. 2017 Supp. 21-5503(a)(3);
 - B) Aggravated indecent liberties with a child, K.S.A. 2017 Supp. 21-5506(b)(3); and
 - C) Aggravated criminal sodomy, K.S.A. 2017 Supp. 21-5504(b)(1) or (b)(2);
- 5) An attempt to commit the following offenses, when the offender is 18 years of age or older and the victim is less than 14 years of age, shall remain off-grid felonies (i.e. the reduction of severity level shall not apply):
 - A) Aggravated human trafficking, K.S.A. 2017 Supp. 21-5426(b);
 - B) Commercial sexual exploitation of a child, K.S.A. 2017 Supp. 21-6422; and
 - C) Sexual exploitation of a child, K.S.A. 2017 Supp. 21-5510(a)(1) or (a)(4).

Nondrug Crimes

Conspiracy to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for conspiracy to commit a nondrug felony shall be a severity level 10. K.S.A. 2017 Supp. 21-5302(d)(1).

Drug Crimes

Conspiracy to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months. K.S.A. 2017 Supp. 21-5302(e).

Misdemeanors

Conspiracy to commit a misdemeanor is a class C misdemeanor. K.S.A. 2017 Supp. 21-5302(f).

SOLICITATION

Off-grid Crimes

Criminal solicitation to commit an off-grid felony shall be ranked at nondrug severity level 3, with the following exceptions from K.S.A. 2017 Supp. 21-5303:

- 1) Terrorism, K.S.A. 2017 Supp. 21-5421;
- 2) Illegal use of weapons of mass destruction, K.S.A. 2017 Supp. 21-5421;
- 3) An attempt to commit the following offenses, if the offender is 18 years of age or older:
 - A) Rape, K.S.A. 2017 Supp. 21-5503(a)(3);
 - B) Aggravated indecent liberties with a child, K.S.A. 2017 Supp. 21-5506(b)(3); and
 - C) Aggravated criminal sodomy, K.S.A. 2017 Supp. 21-5504(b)(1) or (b)(2);
- 4) An attempt to commit the following offenses, when the offender is 18 years of age or older and the victim is less than 14 years of age, shall remain off-grid felonies (i.e. the reduction of severity level shall not apply):
 - D) Aggravated human trafficking, K.S.A. 2017 Supp. 21-5426(b);
 - E) Commercial sexual exploitation of a child, K.S.A. 2017 Supp. 21-6422; and
 - F) Sexual exploitation of a child, K.S.A. 2017 Supp. 21-5510(a)(1) or (a)(4).

Nondrug Crimes

Criminal solicitation to commit any other nondrug felony shall be ranked on the nondrug scale at three severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for solicitation to commit a nondrug felony shall be a severity level 10. K.S.A. 2017 Supp. 21-5303(d)(1).

Drug Crimes

Criminal solicitation to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months. K.S.A. 2017 Supp. 21-5303(e).

MISDEMEANORS

Punishment and disposition of misdemeanors is not provided on the drug or nondrug sentencing grids.

Misdemeanors are established by class as follows:

- Class A misdemeanors, punishable by a county jail sentence of not more than 1 year;
- Class B misdemeanors, punishable by a county jail sentence of not more than 6 months;
- Class C misdemeanors, punishable by a county jail sentence of not more than 1 month; and
- Unclassified misdemeanors, which are punishable as specified by law, but if no such penalty is provided they are treated as Class C misdemeanors. See K.S.A. 2017 Supp. 21-6602.

A person convicted of a misdemeanor may be punished by a fine pursuant to K.S.A. 2017 Supp. 21-6611. Additional sentencing dispositions for misdemeanors are provided in K.S.A. 2017 Supp. 21-6604. The period of probation for a misdemeanor shall not exceed two years, subject to renewal and extension for additional fixed periods of two years. The court may terminate probation at any time. K.S.A. 2017

Supp. 21-6608(a). The district court may parole any misdemeanor sentenced to confinement in a county jail. Such period of parole shall not exceed two years and may be terminated by the court at any time. K.S.A. 2017 Supp. 21-6608(b).

DRUG DISTRIBUTION AND CULTIVATION CRIMES

DRUG DISTRIBUTION

Most drug distribution and cultivation crimes are punished on the drug grid according to the type and quantity of substance distributed, possessed with the intent to distribute, or cultivated. The one exception is distribution of drugs listed in K.S.A. 65-4113 (Schedule V), which is not punished according to quantity. It is either a Class A person misdemeanor, or if distributed to a minor, a nondrug severity level 7 person felony.

Distributing or possessing with intent to distribute a controlled substance within 1000 feet of school property shall increase the severity level by one level. For example, distributing 3.5 grams of heroin within 1000 feet of a school would be a level 1 drug felony.

The following tables show the amount of each drug and quantity, along with the corresponding severity level of punishment. Certain substances may be measured according to “dosage units”, which include discrete units such as pills, capsules and microdots. K.S.A. 2017 Supp. 21-5705.

Heroin/Meth		Marijuana		Dosage Unit		All Others	
Amount	SL	Amount	SL	Amount	SL	Amount	SL
Less than 1 gram	4	Less than 25 grams	4	Less than 10 units	4	Less than 3.5 grams	4
1 gram but less than 3.5 grams	3	25 grams but less than 450 grams	3	10 units but less than 100 units	3	3.5 grams but less than 100 grams	3
3.5 grams but less than 100 grams	2	450 grams but less than 30 kilograms	2	100 units but less than 1,000 units	2	100 grams but less than 1 kilogram	2
100 grams or more	1	30 kilograms or more	1	1,000 units or more	1	1 kilogram or more	1

There is a rebuttable presumption of intent to distribute when the offender possesses the following amounts, or greater, of the following controlled substances. The burden to overcome this rebuttable presumption is upon the defendant. The quantities at which the rebuttable presumption applies are as follows:

Type of Drug	Amount
Marijuana	450 grams
Heroin	3.5 grams
Methamphetamine	3.5 grams
Any other drug	100 grams
Dosage Units	100

See K.S.A. 2017 Supp. 21-5705(e).

DRUG CULTIVATION

It shall be unlawful for any person to cultivate any controlled substance or controlled substance analog listed in K.S.A. 2017 Supp. 21-5705(a). The severity level for drug cultivation crimes are as follows:

Number of Plants	Severity Level
More than 4 but less than 50	3
50 or more but less than 100	2
100 or more	1

See K.S.A. 2017 Supp. 21-5705(d)(7).

CHAPTER II: PROCEDURE PRIOR TO SENTENCING

DETERMINATION OF THE DATE OF OFFENSE: APPLICATION TO THE SENTENCING GUIDELINES

The Kansas Sentencing Guidelines Act (KSGA) applies to all felony crimes committed on or after July 1, 1993. All felony crimes committed prior to that date should be prosecuted under the laws existing prior to that date. A crime is committed prior to July 1, 1993, if any essential elements of the crime as then defined occurred before July 1, 1993. If it cannot be determined that the crime was committed prior to or after July 1, 1993, the offender should be prosecuted under laws existing prior to the KSGA. See K.S.A. 2017 Supp. 21-6802.

The date of offense controls selection of the Presentence Investigation (PSI) and Journal Entry (JE) forms. Each year the Kansas Sentencing Commission modifies these forms to comport with the laws and special sentencing rules in effect beginning July 1 of that year. Therefore, when completing a PSI or journal entry form make sure that the year of the form corresponds with the laws in effect for the date of offense. Examples: For an offense committed on May 1, 2001, complete the 2000 Journal entry form. For an offense committed October 7, 1996, the 1996 Journal entry form should be completed.

When using the Probation Violation Journal Entry (PVJE) form, the most recent version should be used, regardless of the date of the offense.

Forms may be found at the Kansas Sentencing Commission website: www.sentencing.ks.gov/forms.

CHARGING DOCUMENTS

All charging documents filed for crimes to be sentenced under the KSGA system should allege facts sufficient to classify the crime severity level of the offense on the guidelines grid. If a particular felony crime is sub-classified into different versions of the same offense that have been assigned different severity levels, the charge should include facts sufficient to establish the required elements of the version of the offense carrying the severity level reflected in the charging document. See K.S.A. 22-3201 for the requisites of a complaint, indictment or information.

CONSOLIDATION

Consolidation for trial of separate indictments or informations. The court may order two or more complaints, informations or indictments against a single defendant to be tried together if the crimes could have been joined in a single complaint, information or indictment. K.S.A. 22-3203.

FINGERPRINTING

MUNICIPAL COURT DUTIES

The court is required to ensure that fingerprints are taken upon conviction for a city ordinance violation comparable to a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 2017 Supp. 21-5412. See K.S.A. 2017 Supp. 12-4517(a).

LAW ENFORCEMENT DUTIES

Every sheriff, police department, or countywide law enforcement agency in the state is required to make two sets of fingerprint impressions and one set of palm impressions of a person who is arrested if the person:

- is wanted for the commission of a felony. On or after July 1, 1993, fingerprints and palm prints shall also be taken if the person is wanted for the commission of a class A or B misdemeanor or a violation of a county resolution which would be the equivalent of a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 2017 Supp. 21-5412;
- is believed to be a fugitive from justice;
- may be in the possession at the time of arrest of any goods or property reasonably believed to have been stolen by the person;
- is in possession of firearms or other concealed weapons, burglary tools, high explosives or other appliances believed to be used solely for criminal purposes;
- is wanted for any offense which involves sexual conduct prohibited by law or for violation of the uniform controlled substances act; or
- is suspected of being or known to be a habitual criminal or violator of the intoxicating liquor law.

See K.S.A. 2017 Supp. 21-2501(a).

COUNTY/DISTRICT COURT DUTIES

The court shall ensure, upon the accused person's first appearance, or in any event, before final disposition of a felony or a class A or B misdemeanor or a violation of a county resolution which prohibits an act which is prohibited by a class A or B misdemeanor, the offender has been processed, fingerprinted and palm printed. See K.S.A. 2017 Supp. 21-2501(b).

JUVENILE COURT DUTIES

Fingerprints or photographs shall not be taken of any juvenile who is taken into custody for any purpose, with the following exceptions:

- Fingerprints or photographs of a juvenile may be taken if authorized by the court having jurisdiction;
- Fingerprints and photographs shall be taken of all juvenile offenders adjudicated due to commission of an offense which if committed by an adult would constitute the commission of a felony, a class A or B misdemeanor or assault as defined in K.S.A. 2017 Supp. 21-5412(a).
- Fingerprints or photographs of a juvenile may be taken under K.S.A. 2017 Supp. 21-2501, if the juvenile has been prosecuted as an adult pursuant to K.S.A. 2017 Supp. 38-2347; and
- Fingerprints or photographs shall be taken of any juvenile admitted to a juvenile correctional facility
- Photographs may be taken of any juvenile admitted to a juvenile detention facility.

See K.S.A. 2017 Supp. 38-2313.

DNA SAMPLE COLLECTION

Offenders who are convicted of certain crimes or adjudicated of certain juvenile offenses shall be required to submit a DNA or biological sample to the Kansas Bureau of investigation. The details of this procedure are provided in K.S.A. 21-2511.

OFFICIAL RECORDS

All Kansas law enforcement agencies shall maintain a permanent record, on forms approved by the Attorney General, of all felony and misdemeanor offenses reported or known to have been committed within their respective jurisdictions. K.S.A. 21-2501a(a). All law enforcement agencies must file a report of such offenses, on a form approved by the Attorney General, with the Kansas Bureau of Investigation (KBI) within 72 hours after such offense is reported, or known to have been committed. K.S.A. 21-2501a(b). All law enforcement agencies must report within 30 days, on forms approved by the Attorney General, any methamphetamine laboratory seizures or dump sites and any theft or attempted theft of anhydrous ammonia that occurs in such agency's jurisdiction. K.S.A. 21-2501a(c).

PLEA AGREEMENT RULES

PERMISSIBLE AND IMPERMISSIBLE PLEAS

The prosecutor and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea to a charged offense or to a lesser or related offense, the prosecutor may do any of the following:

- Move for dismissal of other charges or counts;
- recommend a particular sentence within the sentencing range applicable to the offense or to the offense to which the offender pled guilty;
- recommend a particular sentence outside of the sentencing range only when departure factors exist and such factors are stated on the record;
- agree to file a particular charge or count;
- agree not to file charges or counts; or
- make any other promise to the defendant, except as provided below. K.S.A. 2017 Supp. 21-6812.

However, a prosecutor shall NOT:

- enter into any agreement to decline to use a prior drug conviction of the defendant to elevate or enhance the severity level of a drug crime as provided in K.S.A. 2017 Supp. 21-5703, 21-5705 or 21-5706; or
- make any agreement to exclude any prior conviction from the criminal history of the defendant. K.S.A. 2017 Supp. 21-6812(f).

DUI AND TEST REFUSAL PLEAS*

No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation DUI or Test Refusal*, or a violation of any ordinance of a city or resolution of any county in this state which prohibits the same, to avoid the mandatory penalties established by statute or ordinance. K.S.A. 2017 Supp. 8-1025(l) and 8-1567(m).

**K.S.A. 8-1025 was ruled unconstitutional by State v. Ryce, 306 Kan. 682 (2017). Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2017 Supp. 21-6810(d)(8).*

ACCEPTANCE OF PLEA AND SENTENCING

At the time of acceptance of a plea of guilty or *nolo contendere*, the sentencing court must inform the offender of the specific severity level of the crime and the range of penalties associated with that severity level. See K.S.A. 2017 Supp. 22-3210.

The sentencing court is not bound to follow an agreed sentencing recommendation. It has the discretion to impose up to the maximum sentence in the applicable grid block. See K.S.A. Supp. 2017 21-6804(e)(1) and K.S.A. Supp. 2017 21-6805(c)(1), and, e.g., *State v. Johnson*, 286 Kan. 824, 190 P.3d 207 (2008).

Once the guilty or *nolo contendere* plea has been accepted by the court, the severity level of the crime cannot be elevated for sentencing purposes due to the subsequent discovery of prior convictions which would have raised the severity level of the crime; instead the prior convictions will be used in the determination of the criminal history category. See K.S.A. 2017 Supp. 21-6807(c)(4).

SB 123 DRUG TREATMENT

As part of a plea, the offender must still have the requisite LSI-R and SASSI score in order to be admitted into the SB 123 program. The court may direct the defendant to undergo criminal risk-need and drug abuse assessments required by K.S.A. 2017 Supp. 21-6824 at any time in order to determine SB 123 drug treatment eligibility. The defendant will still be responsible for payment of all assessment fees imposed by the court at sentencing.

DIVERSIONS

A diversion agreement cannot be entered into for a class A or B felony or for crimes committed on or after July 1, 1993, constituting an off-grid crime, a nondrug severity level 1, 2 or 3 felony, or a drug severity level 1 or 2 felony for drug crimes committed on or after July 1, 1993 but before July 1, 2012, or a drug severity level 1, 2, or 3 felony committed on or after July 1, 2012. K.S.A. 2017 Supp. 22-2908(b)(2).

For more information on the specific requirements of diversion agreements for certain offenses, please see K.S.A. 22-2909. No defendant shall be required to enter any plea to a criminal charge as a condition of diversion. K.S.A. 22-2910.

DUI AND TEST REFUSAL*

A diversion agreement cannot be entered into for a DUI or test refusal violation if: the defendant has previously participated in a diversion for alleging a violation of that statute; has previously been convicted of or pleaded *nolo contendere* to a DUI; or, during the time of the DUI the defendant was involved in a motor vehicle accident or collision resulting in personal injury or death. K.S.A. 2017 Supp. 22-2908(b)(1).

A diversion agreement cannot be entered into for a DUI or test refusal* violation more than once in a person's lifetime. K.S.A. 2017 Supp. 8-1025(h)(7) and K.S.A. 8-1567(i)(6).

**K.S.A. 8-1025 was ruled unconstitutional by State v. Ryce, 306 Kan. 682 (2017). Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring*

purposes. K.S.A. 2017 Supp. 21-6810(d)(8).

DOMESTIC VIOLENCE OFFENSES

A diversion agreement cannot be entered into where the complaint alleges a domestic violence offense, as defined in K.S.A. 2017 Supp. 21-5111, and the defendant has participated in two or more diversions in the previous five-year period upon complaints alleging a domestic violence offense. K.S.A. 22-2908(b)(3).

BUYING SEXUAL RELATIONS

A person may enter into a diversion agreement for a violation of buying sexual relations, or a similar ordinance, only once during the person's lifetime. K.S.A. 2017 Supp. 21-6421(c)(2).

WILDLIFE, PARKS AND TOURISM LAWS

A county or district attorney may enter into a diversion agreement in lieu of criminal proceedings on a complaint for violation of Wildlife, Parks, and Tourism laws (K.S.A. 2017 Supp. 32-1001 *et. seq.*) if the diversion carries the same penalties as the conviction for the corresponding violation. If the defendant has previously participated in one or more diversions then each subsequent diversion would carry the same penalties as the conviction for the corresponding violation. See K.S.A. 2017 Supp. 22-2908(c).

DEFERRING SENTENCE PENDING MENTAL EXAMINATION

A mental health examination may be completed on the offender as part of the presentence investigation report. The sentencing court may commit the offender to a state security hospital or suitable local mental health facility for such examination. The maximum duration of commitment that can be imposed for the examination is 120 days. K.S.A. 2017 Supp. 22-3429.

DOMESTIC VIOLENCE OFFENSE DESIGNATION

In all criminal cases filed in district or municipal court, if there is evidence that the defendant committed a domestic violence offense, the trier of fact shall determine whether the defendant committed a domestic violence offense. K.S.A. 2017 Supp. 22-4616.

If the trier of fact determines that the defendant committed a domestic violence offense, the court shall place a domestic violence designation on the criminal case and the defendant shall be subject to the provisions of K.S.A. 2017 Supp. 21-6604(p), and amendments thereto.

The court shall not place a domestic violence designation on the criminal case and the defendant shall not be subject to the provisions of K.S.A. 2017 Supp. 21-6604(p), only if the court finds on the record that:

- The defendant has not previously committed a domestic violence offense or participated in a diversion upon a complaint alleging a domestic violence offense; AND
- the domestic violence offense was not used to coerce, control, punish, intimidate or take revenge against a person with whom the offender is involved or has been involved in a dating relationship or against a family or household member. K.S.A. 2017 Supp. 22-4616.

The assessment may be used by the court to determine an appropriate sentence, and shall be provided to the supervising entity after sentencing. The defendant shall be required to pay for the assessment and all

subsequent recommendations. K.S.A. 2017 Supp. 21-6604(p).

DOMESTIC BATTERY

The definition of the crimes of domestic battery, aggravated domestic battery and provisions relating thereto, are provided in K.S.A. 2017 Supp. 21-5414.

CHAPTER III: CRIMINAL HISTORY

CRIMINAL HISTORY RULES

The horizontal axis or top of the grid represents the criminal history categories. Nine categories are used to designate prior criminal history. Category A is used to categorize offenders having 3 or more prior felony convictions designated as person crimes. Category I is used to categorize offenders having either no criminal record or a single conviction or juvenile adjudication for a misdemeanor. The criminal history categories classify an offender's criminal history in a quantitative as well as a qualitative manner. The categories between A and I reflect cumulative criminal history with an emphasis on whether prior convictions were for person crimes or nonperson crimes. Generally, person crimes are weighed more heavily than nonperson crimes. Within limits, prior convictions for person crimes will result in a harsher sentence for the current crime of conviction. See K.S.A. 2017 Supp. 21-6809.

The criminal history scale is represented in an abbreviated form on the horizontal axis of the nondrug grid and the drug grid. The relative severity of each criminal history category decreases from left to right on the grids, with Criminal History Category A being the most serious classification and Criminal History Category I being the least serious classification.

Criminal History Category	Descriptive Criminal History
A	The offender's criminal history includes three or more adult convictions or juvenile adjudications, in any combination, for person felonies.
B	The offender's criminal history includes two adult convictions or juvenile adjudications, in any combination, for person felonies.
C	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, and one or more adult convictions or juvenile adjudications for nonperson felonies.
D	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, but no adult conviction or juvenile adjudication for a nonperson felony.
E	The offender's criminal history includes three or more adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
F	The offender's criminal history includes two adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
G	The offender's criminal history includes one adult conviction or juvenile adjudication for a nonperson felony, but no adult conviction or juvenile adjudication for a person felony.
H	The offender's criminal history includes two or more adult convictions or juvenile adjudications for nonperson and/or select misdemeanors, and no more than two adult convictions or juvenile adjudications for person misdemeanors, but no adult conviction or juvenile adjudication for either a person or nonperson felony.
I	The offender's criminal history includes no prior record, or one adult conviction or juvenile adjudication for a person, nonperson, or a select misdemeanor, but no adult conviction or juvenile adjudication for either a person or a nonperson felony.

PERSON AND NONPERSON CRIMES

The “person” designation generally refers to crimes that inflict, or could inflict harm to another person. Examples of person crimes are robbery, rape, aggravated arson, and battery.

The “nonperson” designation generally refers to crimes committed that inflict, or could inflict, damage to property. Nonperson crimes also include offenses such as drug crimes, failure to appear, suspended driver’s license, perjury, etc.

Unclassified Crimes

Unless otherwise provided by law, unclassified felonies and misdemeanors shall be considered and scored as nonperson crimes for the purpose of determining criminal history. K.S.A. 2017 Supp. 21-6810(d)(6).

Drug Crimes

Drug crimes are designated as nonperson crimes for criminal history scoring. K.S.A. 2017 Supp. 21-6811(h).

Anticipatory Crimes

A prior conviction for an attempt, conspiracy, or solicitation to commit a crime will be treated as a person or nonperson crime in accordance with the designation of the underlying crime. K.S.A. 2017 Supp. 21-6811(g).

SELECT MISDEMEANORS

The “select” designation refers to specific weapons violations. A conviction of criminal possession of a firearm as defined in subsection (a)(1) or (a)(5) of K.S.A. 21-4204, prior to its repeal, criminal use of weapons as defined in subsection (a)(10) or (a)(11) of K.S.A. 2017 Supp. 21-6301, and amendments thereto, or unlawful possession of a firearm as in effect on June 30, 2005, and as defined in K.S.A. 21-4218, prior to its repeal, will be scored as a select class B nonperson misdemeanor conviction or adjudication and shall not be scored as a person misdemeanor for criminal history purposes. See K.S.A. 2017 Supp. 21-6811(b).

CRIMINAL HISTORY CATEGORIES

Criminal history is based upon the following types of prior convictions and/or adjudications:

- person felonies;
- nonperson felonies;
- person misdemeanors and comparable municipal ordinance and county resolution violations;
- class A nonperson misdemeanors and comparable municipal ordinance and county resolution violations; and
- class B nonperson *select* misdemeanors and comparable municipal ordinance and county resolution violations. K.S.A. 2017 Supp. 21-6810(a).

Class B and C nonperson misdemeanor convictions/adjudications are **not** scored for criminal history purposes.

All convictions and adjudications, except as otherwise provided, should be included in the offender’s criminal history. Prior convictions should be recorded in descending order by the date of conviction,

starting with the most recent conviction. An offender's criminal history classification is determined using the following rules:

- Only verified prior convictions will be considered and scored. K.S.A. 2017 Supp. 21-6810 (d)(1).
 - A prior conviction is any conviction, other than another count in the current case which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203, which occurred prior to imposition of sentence in the current case, regardless of whether the crime that was the subject of the prior conviction was committed before or after the commission of the current crime of conviction. K.S.A. 2017 Supp. 21-6810(a).
 - The classification of a prior conviction will be made in accordance with the law applicable at the time of the current crime of conviction. See *State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015).
- Prior convictions or adjudications, whether sentenced concurrently or consecutively, will each be counted separately. K.S.A. 2017 Supp. 21-6810(c).
- All prior adult felony convictions, including expungements, will be considered and scored. K.S.A. 2017 Supp. 21-6810(d)(2).
- Unless otherwise provided by law, unclassified felonies and misdemeanors shall be considered and scored as nonperson crimes for the purpose of determining criminal history. K.S.A. 2017 Supp. 21-6810(d)(7).
- Prior convictions of a crime defined by a statute that has since been repealed shall be scored using the classification assigned at the time of such conviction. K.S.A. 2017 Supp. 21-6810(d)(8).
- Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2017 Supp. 21-6810(d)(9).

JUVENILE ADJUDICATIONS

Except for adjudications that have decayed pursuant to K.S.A. 2017 Supp. 21-6810(d)(4) and (d)(5), prior juvenile adjudications will be treated in the same manner as adult convictions when determining criminal history classification. Out-of-state juvenile adjudications will be treated as juvenile adjudications in Kansas for criminal history purposes. K.S.A. 2017 Supp. 21-6811(f).

The parties are entitled access to the juvenile files and records of the offender in order to discover or verify criminal history. K.S.A. 2017 Supp. 22-3212(i).

DECAY

There will be no decay factor applicable to adult convictions. K.S.A. 2017 Supp. 21-6810(d)(3)(A).

In K.S.A. 2017 Supp. 21-6810(d)(4), a juvenile adjudication will decay if the current crime of conviction is committed after the offender reaches the age of 25, and the adjudication is for an offense:

- Committed before July 1, 1993, which would have been a class D or E felony, if committed by an adult;
- Committed on or after July 1, 1993, which would have been a nondrug severity level 5-10 felony, a nongrid felony, or any drug felony, if committed by an adult; or
- Would be a misdemeanor, if committed by an adult.

The following chart indicates the decay for juvenile adjudications if the current crime of conviction is committed after the offender reaches the age of 25. K.S.A. 2017 Supp. 21-6810(d)(4). The legislature did not intend to retroactively apply the decay provisions of K.S.A. 2016 Supp. 21-6810 because the legislature did not use specific language reflecting an intent to do so or provide any mechanisms to resentence offenders with criminal history scores based on juvenile adjudications. *State v. Martinez*, No. 116,175, 2017 WL 3947378, at *11-12 (Kan.App.2017) (unpublished opinion), *petition for rev. filed* October 5, 2017.

PERSON	NONDRUG	NONPERSON
No Decay	Off-grid	Not Applicable
No Decay	1	No Decay
No Decay	2	No Decay
No Decay	3	No Decay
No Decay	4	No Decay
Decay	5	Decay
Decay	6	Decay
Decay	7	Decay
Decay	8	Decay
Decay	9	Decay
Decay	10	Decay
Decay	Nongrid	Decay
	DRUG	
Not Applicable	1	Decay
Not Applicable	2	Decay
Not Applicable	3	Decay
Not Applicable	4	Decay
Not Applicable	5	Decay
ALL MISDEMEANORS DECAY		

GAP

K.S.A. 2017 Supp. 21-6810(d)(5) creates a gap provision when considering whether to score prior juvenile adjudications. It is intended to act as a complement to the decay provision but does not have an age restriction of 25 like the decay provision. Here a juvenile adjudication will not be considered and scored if:

- The current crime of conviction is committed at least five years after the date of a prior adjudication;

- The offender has no new adjudications or convictions during such five-year period; and
- The juvenile adjudication is for an offense that would be a nondrug severity level 5 through 10 felony, drug felony, nongrid felony, or misdemeanor if committed by an adult.

The gap provision is prospective in nature and therefore can only be applied where the current offense was committed on or after July 1, 2017.

DIVERSIONS

Diversions are not “convictions” and are therefore not included in criminal history, except as otherwise provided by law for current convictions of:

- Involuntary Manslaughter, K.S.A. 2017 Supp. 21-5405(a)(3);
- DUI, K.S.A. 8-1567;
- Test Refusal, K.S.A. 8-1025*;
- Domestic Battery, K.S.A. 2017 Supp. 21-5414; and
- Buying Sexual Relations, K.S.A. 2017 Supp. 21-6421.

A person entering into a diversion agreement does not have a Sixth Amendment right to counsel, thus prior uncounseled diversions may be counted for criminal history purposes. See *State v. Tims*, 49 Kan. App. 2d 845, 317 P.3d 115 (2014).

**K.S.A. 8-1025 was ruled unconstitutional by State v. Ryce, 306 Kan. 682 (2017). Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2017 Supp. 21-6810(d)(8).*

PRIOR CONVICTION AS SENTENCE ENHANCEMENT OR ELEMENT OF PRESENT CRIME

If a prior conviction of any crime operates to enhance the severity level for the current crime of conviction, elevate the current crime of conviction from a misdemeanor to a felony, or constitute elements of the present crime of conviction, that prior conviction cannot be counted in the offender’s criminal history. K.S.A. 2017 Supp. 21-6810(d)(10). Note, however, that prior convictions which elevate the penalty or punishment without raising the severity level of the current crime may be counted for criminal history purposes. *State v. Pearce*, 51 Kan. App. 2d 116, 342 P.3d 963 (2015).

Additional convictions which are not used as enhancements may be used for criminal history purposes. See *State v. Williams*, 47 Kan. App. 2d 102, 272 P.3d 1282 (2012).

Failure to Register as Offender Convictions

A prior conviction that creates the need for registration as a sex, drug or violent offender is an element of the offense of failure to register and may not be counted in determining the criminal history score on conviction of failure to register. See *State v. Pottoroff*, 32 Kan. App. 2d 1161, 96 P.3d 280 (2004).

Aggravated Escape from Custody Convictions

For a conviction of the crime of aggravated escape from custody (K.S.A. 2017 Supp. 21-5911) that requires that the offender be in custody for a felony, such felony is considered an element of the crime and may not be counted in the defendant’s criminal history. See *State v. Taylor*, 262 Kan. 471, 939 P.2d 904 (1997). However, not all alternative means of the crime of aggravated escape require

the element of being in custody for a felony. See *State v. Brown*, 32 Kan. App. 2d 24, 80 P.3d 404 (2003).

Tampering with Electronic Monitoring Equipment Convictions

The conviction giving rise to the order requiring the defendant be subjected to electronic monitoring equipment is not an element of the crime of tampering with electronic monitoring equipment and may be counted for criminal history purposes. (K.S.A. 2017 Supp. 21-6322). See *State v. Thacker*, 48 Kan. App. 2d 515, 292 P.3d 342 (2013).

NONGRID OFFENSES

Nongrid offenses each contain specific penalty provisions within their respective statutes. Criminal history, except as provided in each statute for determining whether the crime is the second, third, fourth or subsequent such offense, are not relevant to the punishment for nongrid offenses. For more information on nongrid offenses, please see Chapter I.

PERSON MISDEMEANORS – CONVERSION TO PERSON FELONIES

Class A and B Person Misdemeanors

Prior adult convictions and juvenile adjudications for class A person misdemeanors and class B person misdemeanors convert to person felonies at a rate of 3 to 1. If the resulting number is a fraction, do not convert the fractional portion because these figures must be in whole numbers. For example, eight person misdemeanor convictions and/or juvenile person adjudications would be converted to two person felony convictions (i.e., $8 \div 3 = 2$). Do not count the remaining "unconverted" or fractional person misdemeanor convictions and/or juvenile person adjudications in the felony score. However, the two remaining convictions and/or adjudications in the example should still be listed in the Person Misdemeanor section. See K.S.A. 2017 Supp. 21-6811(a).

The Assault Rule

Every three prior adult convictions or juvenile adjudications of misdemeanor assault (a class C person misdemeanor), as defined in K.S.A. 21-3408, prior to its repeal, or subsection (a) of K.S.A. 2017 Supp. 21-5412, that occurred within a period of three years commencing immediately prior to the date of conviction for the current crime, shall be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. K.S.A. 2017 Supp. 21-6811(a).

INVOLUNTARY MANSLAUGHTER AND DUI

See Special Rule #42. If the current crime of conviction is involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 2017 Supp. 21-5405(a)(3), each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for a violation of K.S.A. 8-2,144 (Commercial DUI), K.S.A. 8-1567 (DUI), K.S.A. 2017 Supp. 8-1025 (Test Refusal)* or a violation of a law of another state or an ordinance of any city, or resolution of any county which prohibits acts described in K.S.A. 8-2,144 (Commercial DUI), 8-1567 or K.S.A. 2017 Supp. 8-1025 (Test Refusal)*, shall count as one person felony for criminal history purposes. K.S.A. 2017 Supp. 21-5405(a)(3) and K.S.A. 2017 Supp. 21-6811(c)(2).

**K.S.A. 8-1025 was ruled unconstitutional by State v. Ryce, 306 Kan. 682 (2017). Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2017 Supp. 21-6810(d)(8).*

LEAVING THE SCENE OF AN ACCIDENT

See Special Rule #41. If the current crime of conviction is leaving the scene of an accident when the accident involves property damage of \$1000 or more, great bodily harm or the death of any person, K.S.A. 8-1602(b)(2),(3) and (4), the following prior convictions, if for an act committed on or after July 1, 2011, shall count as a person felony for criminal history purposes:

- 8-235, driving a vehicle without a license;
- 8-262, driving while license is canceled, suspended, or revoked;
- 8-287, driving while one's privileges are revoked for being a habitual violator;
- 8-291, violating restrictions on driver's license or permit;
- 8-1566, reckless driving;
- 8-1567, driving under the influence of alcohol or drugs;
- 8-1568, fleeing or attempting to elude a police officer;
- 8-1602, leaving the scene of an accident resulting in injury, great bodily harm, or death;
- 8-1605, failing to contact the owner of vehicle following an accident causing damage to unattended property;
- 40-3104, failing to obtain motor vehicle liability insurance coverage;
- K.S.A. 2017 Supp. 21-5405(a)(3), involuntary manslaughter committed while DUI;
- K.S.A. 2017 Supp. 21-5406, vehicular homicide; or
- A violation of a city ordinance or law of another state which would also constitute a violation of such sections. K.S.A. 2017 Supp. 21-6811(i).

BURGLARY

Prior adult convictions and juvenile adjudications for burglary will be scored for criminal history purposes as follows:

- If the prior burglary conviction occurred prior to the Kansas Sentencing Guidelines Act (1993), it will be scored as a nonperson felony. *State v. Dickey*, 301 Kan. 1018, 350 P.3d 1054 (2015)(District court was constitutionally prohibited from classifying Dickey's prior burglary adjudication as a person felony because doing so would have required the district court to make or adopt a factual finding that went beyond simply identifying the statutory elements that constituted the prior burglary adjudication).
- If the post-KSGA prior burglary conviction was classified as a burglary to a dwelling, as described in K.S.A. 21-3715(a), prior to its repeal, or K.S.A. 2017 Supp. 21-5807(a)(1), it will be scored as a prior person felony. K.S.A. 2017 Supp. 21-6811(d)(1).
- If the post-KSGA prior burglary conviction was classified as a burglary to a building other than a dwelling, as described in K.S.A. 21-3715(b), prior to its repeal, or K.S.A. 2017 Supp. 21-5807(a)(2) or as a burglary to a motor vehicle or other means of conveyance of persons or property, as described in K.S.A.21-3715(c), prior to its repeal, or K.S.A. 2017 Supp. 21-5807(a)(3), it will be scored as a nonperson felony. K.S.A. 2017 Supp. 21-6811(d)(2).

The facts required to classify prior adult convictions or juvenile adjudications for burglary must be established by the State by a preponderance of the evidence. See K.S.A. 2017 Supp. 21-6811(d)(2).

K.S.A. 2017 Supp. 21-5807 creates special rule #47 for a conviction of residential burglary. This law creates a special sentencing rule for burglary of a dwelling to make the sentence presumptive

imprisonment if the offender has a criminal history score of C (one previous person felony and one previous nonperson felony), D (one previous person felony), or E (three or more nonperson felonies).

OUT-OF-STATE CONVICTIONS

Convictions or adjudications occurring within the federal system, other state systems, the District of Columbia, foreign, tribal, or military courts are considered out-of-state convictions or adjudications. K.S.A. 2017 Supp. 21-6811(e). Prior out-of-state convictions and juvenile adjudications will be used to determine the appropriate criminal history category classification.

Deferred adjudications and other processes that result in a finding of guilt without punishment from a foreign jurisdiction may be counted in the defendant's criminal history. See *State v. Macias*, 30 Kan. App. 2d 79, 39 P.3d 85 (2002) (No matter what lenience another state may wish to show, once we are satisfied that a defendant's factual guilt was established in a foreign state, that prior crime will count in Kansas).

Classification as Felony or Misdemeanor

Out-of-state crimes will be classified as either felonies or misdemeanors according to the law of the convicting jurisdiction. K.S.A. 2017 Supp. 21-6811(e)(2). If a crime is a felony in another state, it will be counted as a felony in Kansas. If a crime is a misdemeanor in another state, the state of Kansas shall refer to the comparable offense in order to classify the out-of-state crime as a class A, B or C misdemeanor. If the comparable misdemeanor crime in the state of Kansas is a felony, the out-of-state crime shall be classified as a class A misdemeanor. If the state of Kansas does not have a comparable crime, the out-of-state crime shall not be used in classifying the offender's criminal history. K.S.A. 2017 Supp. 21-6811(e)(2)(B). The facts required to classify out-of-state adult convictions and juvenile adjudications must be established by the State by a preponderance of the evidence. K.S.A. 2017 Supp. 21-6811(e).

The Legislature intended the sentencing court to compare a prior conviction to the most comparable Kansas offense to make a felony or misdemeanor determination when such conviction occurred in a jurisdiction that does not distinguish between felonies and misdemeanors, such as a military proceeding. *State v. Hernandez*, 24 Kan. App. 2d 285, 286-289, 944 P.2d 188, 192-193 (1997). However, because K.S.A. 21-6811(e) is silent on how to classify an out-of-state conviction for criminal history purposes when the convicting jurisdiction does not make a determination as a felony or a misdemeanor, then the rule of lenity is applied. *State v. Horselooking*, 54 Kan.App.2d 343, 400 P.3d 189, *petition for rev. filed July 13, (2017)*(tribal conviction for residential burglary classified as a person misdemeanor for criminal history purposes). See also *State v. Smith*, No. 116,586, 2017 WL 4558253 (Kan.App. 2017)(unpublished opinion)(Missouri ordinance violations of assault and endangering welfare of a child not convictions in Missouri and not to be scored for criminal history purposes in subsequent Kansas case).

Classification as Person or Nonperson Crime

A comparable offense need not contain elements identical to those of the out-of-state crime, but must be similar in nature and cover a similar type of criminal conduct. *State v. Schultz*, 22 Kan. App. 2d 60, 62, 911 P.2d 1119 (1996).

The court may use any comparable Kansas offense, regardless of whether the crime is a felony or a misdemeanor. For example, if the out-of-state conviction is a misdemeanor, the court could use a Kansas

felony as the comparable crime in order to determine if the conviction is scored as a nonperson or person crime. *State v. LaGrange*, 21 Kan. App. 2d 477, 901 P.2d 44 (1995).

The legislature intended for all prior convictions and juvenile adjudications—including convictions and adjudications occurring before implementation of the KSGA—to be considered and scored for purposes of determining an offender's criminal history score. In order to do this, a pre-KSGA conviction and/or adjudication must be classified as either a person or nonperson offense by comparing the criminal statute under which the prior offense arose to the comparable post-KSGA criminal statute. The comparable post-KSGA Kansas criminal statute is the one in effect at the time the current crime of conviction was committed. *State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015).

If Kansas has no comparable offense, the sentencing court must classify the out-of-state conviction as a nonperson crime. K.S.A. 2017 Supp. 21-6811(e)(3).

PROOF OF CRIMINAL HISTORY

CRIMINAL HISTORY WORKSHEET

Except as provided in K.S.A. 2017 Supp. 21-6814, the sentencing court may take judicial notice in a subsequent felony proceeding of an earlier criminal history worksheet included in a presentence investigation report prepared for a prior sentencing of the defendant for a felony committed on or after July 1, 1993, as verification of the criminal history reflected on the worksheet. K.S.A. 2017 Supp. 21-6813(f). See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

Unless disputed by the offender, the criminal history worksheet serves as adequate verification of the offender's criminal history. If the offender disputes any aspect of the criminal history worksheet portion of the presentence investigation report as prepared by the field services officer, the offender shall immediately notify the district attorney and the court with a written notice specifying the exact nature of the alleged error. The State will then have the burden of producing further evidence to satisfy its burden of proof regarding any disputed part, or parts, of the criminal history. The sentencing judge must allow the state reasonable time to produce such evidence to establish the disputed portion of the criminal history by a preponderance of the evidence. If the offender later challenges such offender's criminal history, which has been previously established, the burden of proof shall shift to the offender to prove such offender's criminal history by a preponderance of evidence. K.S.A. 2017 Supp. 21-6814.

The sentencing court has the duty and authority to correct any errors on the criminal history worksheet.

UNCOUNSELED MISDEMEANOR CONVICTIONS

A person accused of a misdemeanor has a Sixth Amendment right to counsel if the sentence to be imposed upon conviction includes a term of imprisonment, even if the jail time is suspended or conditioned upon a term of probation. *State v. Long*, 43 Kan. App. 2d 328, 225 P.3d 754 (2010). A previous misdemeanor conviction in which the defendant was denied counsel and sentenced to a term of imprisonment, even if such term of imprisonment was suspended or conditioned upon a nonprison sanction, may not be counted in the offender's criminal history. However, if the offender's sentence did not include a term of imprisonment, the previous conviction may be counted in the offender's criminal history.

CHAPTER IV: PRESENTENCE INVESTIGATION REPORTS

A copy of the Kansas Sentencing Guidelines Act Presentence Investigation Report form along with the instructions for completing the form are contained in Appendix A of this Manual.

REQUIREMENTS

The sentencing court is required to order a Presentence Investigation Report (PSI) to be prepared by a court services officer as soon as possible after every felony conviction involving crimes committed on or after July 1, 1993, including all unclassified felonies. K.S.A. 2017 Supp. 21-6813(a). All presentence investigation reports in any case in which the defendant has been convicted of a felony shall be on a form approved by the Kansas Sentencing Commission. K.S.A. 2017 Supp. 21-6813(g). This format must be used to provide consistency statewide.

A copy of the PSI, including the Criminal History Worksheet, and the Journal Entry of Judgment, all attached together, must be sent to the Kansas Sentencing Commission for each felony case within thirty days after sentencing. K.S.A. 2017 Supp. 22-3439(a).

Field services officers are responsible for preparing the Presentence Investigation Report (PSI). The PSI report is mandatory in all felony cases under the KSGA. The primary purpose of the PSI report is to provide complete and accurate information about the criminal history of the offender, because criminal history is one of the two primary determining factors of the appropriate sentence established by the guidelines for the crime of conviction. Consequently, the Criminal History Worksheet is an essential component of the PSI report. The PSI report will contain a computation of the presumptive sentence provided by the guidelines for the crime of conviction, based on the crime severity level provided by the guidelines and the criminal history of the offender.

The Criminal History Worksheet should indicate the officer's source of information for each prior conviction listed, and copies of any verifying documents available to the officer should be attached, including criminal history worksheets prepared in prior cases in which sentencing occurred after July 1, 1993, and in which the worksheet was prepared in accordance with the requirements of the KSGA.

A PSI report that has been prepared in accordance with the requirements of the KSGA after its effective date of July 1, 1993, can be the subject of judicial notice by a sentencing court in any subsequent felony proceeding. See K.S.A. 2017 Supp. 21-6814(f).

Each PSI prepared for an offender to be sentenced for one or more felonies committed on or after July 1, 1993, shall be limited to the following information:

- A summary of the factual circumstances of the crime or crimes of conviction.
- If the defendant desires to provide one, a summary of the defendant's version of the crime.
- When there is an identifiable victim, a victim report. To the extent possible, the report shall include a complete listing of restitution for damages suffered by the victim.
- An appropriate classification of each crime of conviction on the crime severity scale.
- A listing of prior adult convictions or juvenile adjudications for felony or misdemeanor crimes or violations of county resolutions or city ordinances comparable to any misdemeanor defined by state law. Such listing shall include an assessment of the appropriate classification of the criminal history on the criminal history scale, the source of information regarding each listed prior conviction and

copies of any available source of journal entries or other documents through which the listed convictions may be verified, including any prior criminal history worksheets.

- Proposed grid block classification for each crime, or crimes of conviction and the presumptive sentence for each crime, or crimes of conviction.
- If the proposed grid block classification is a grid block that presumes imprisonment, the presumptive prison term range and the presumptive duration of postrelease supervision as it relates to the crime severity.
- If the proposed grid block classification does not presume prison, the presumptive prison term range and the presumptive duration of the nonprison sanction as it relates to the crime severity scale and the court services officer's professional assessment as to recommendations for conditions to be included as part of the nonprison sanction.
- For defendants who are being sentenced for a conviction of a felony violation of K.S.A. 2017 Supp. 21-5706, and meet the requirements of K.S.A. 2017 Supp. 21-6824 (2003 Senate Bill 123), the drug abuse assessment package as provided in K.S.A. 2017 Supp. 21-6824.

The PSI will become part of the court record and is accessible to the public, except that the official version, defendant's version, victim's statement, any psychological reports, drug and alcohol reports and assessments shall be accessible only to the parties, the sentencing judge, the department of corrections, and if requested, the Kansas Sentencing Commission. If the offender is committed to the custody of the secretary of corrections, the report shall be sent to the secretary and the warden of the state correctional institution to which the defendant is conveyed in accordance with K.S.A. 2017 Supp. 75-5220. K.S.A. 2017 Supp. 21-6813(c).

If the offense requires the offender to register under the Kansas Offender Registration Act (K.S.A. 2017 Supp. 22-4901 *et seq.*), the PSI Offender Registration Supplement should be completed.

The criminal history worksheet will not substitute as a presentence investigation report. K.S.A. 2017 Supp. 21-6813(d).

The PSI will not include optional report components, which would be subject to the discretion of the sentencing court in each district except for psychological reports and drug and alcohol reports. K.S.A. 2017 Supp. 21-6813(e).

CHAPTER V: SENTENCING

SENTENCING RANGE

Each grid block states the presumptive sentencing range, in months, for an offender whose crime of conviction and criminal history place such offender in that grid block. The middle number in the grid block is the “standard” number of months, the upper number in the grid block is the “aggravated” number of months, and the lower number in the grid block is the “mitigated” number of months.

The sentencing court may impose any sentence within the presumptive sentencing range. The sentencing court should select the midpoint or standard term of months in the usual case and use the upper or lower term to take into account any aggravating and mitigating factors that do not amount to sufficient justification for a departure.

A sentence to any term, including an aggravated term, within the range in a Kansas sentencing guideline presumptive grid box is constitutional. Because a sentence that falls within a grid box is a presumptive sentence, appellate courts lack jurisdiction to consider a challenge to such sentence under K.S.A. 2017 Supp. 21-6820(c). Appellate courts lack jurisdiction even if the sentence is to the longest term in the presumptive grid box for a defendant’s convictions. *State v. Johnson*, 286 Kan. 824, 190 P.3d 207 (2008).

While the sentencing grids provide presumptive punishment for felony convictions, the sentencing court may impose a durational or dispositional departure when substantial and compelling circumstances exist. See K.S.A. 2017 Supp. 21-6804 and K.S.A. 2017 Supp. 21-6815.

PRESUMPTIVE IMPRISONMENT

If an offense is classified in a grid block above the dispositional line, the presumptive disposition shall be imprisonment. In presumptive imprisonment cases, the sentencing court must pronounce the prison sentence, the maximum potential good time reduction to such sentence and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision will not negate the period of postrelease supervision. K.S.A. 2017 Supp. 21-6804(e)(2) and 21-6805(c)(2).

PRESUMPTIVE NONPRISON

If an offense is classified in a grid block below the dispositional line, the presumptive disposition shall be nonprison. In a presumptive nonprison case, the sentencing court shall pronounce the duration of the nonprison sanction AND the underlying prison sentence. See K.S.A. 2017 Supp. 21-6804(e)(3), 21-6805(c)(3) and K.S.A. 2017 Supp. 21-6806(b).

BORDER BOXES

If an offense is classified in grid blocks 5-H, 5-I or 6-G of the nondrug grid, or grid blocks 4-E, 4-F, 4-G, 4-H or 4-I and 5-C, or 5-D of the drug grid, the sentence is presumed imprisonment, but the court may impose an optional nonprison sentence upon making the following findings on the record:

- An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and the recommended treatment program is available and the offender can be admitted to the program within a reasonable period of time; or
- The nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2017 Supp. 21-6804(f) and 21-6805(d).

SENTENCING OPTIONS

AUTHORIZED DISPOSITIONS

Whenever a person has been convicted of a crime, the sentencing court has several sentencing options available that may be imposed either alone or in combination. K.S.A. 2017 Supp. 21-6604.

The court may:

- Commit the defendant to the custody of the Secretary of Corrections if the current crime is a felony and the sentence presumes imprisonment, or the sentence imposed is a dispositional departure to imprisonment;
- Commit the defendant to jail for the term provided by law if confinement is for a misdemeanor or a nongrid felony;
- Release the defendant on probation, under the supervision of a court services officer, if the defendant's crime and criminal history place such defendant in a presumptive nonprison category or, through a departure for substantial and compelling reasons and subject to conditions as the court deems appropriate which may include the imposition of a jail term of not more than 60 days;
- Impose fines applicable to the offense that may be paid in installments if authorized by the court. The court may order performance of community service in lieu of payment of any fine imposed. The credit on the fine imposed will be applied at a rate of \$5 for each full hour of community service performed;
- Assign the defendant to a community correctional services program pursuant to K.S.A. 2017 Supp. 75-5291, or through a departure for substantial and compelling reasons and subject to conditions as the court deems appropriate which may include full or partial restitution;
- Assign to a conservation camp for a period not to exceed 6 months as a condition of the probation followed by a 6 month period of follow-up through adult intensive supervision by a community correctional services program, if the offender successfully completes the conservation camp program*;
- Assign the defendant to house arrest pursuant to K.S.A. 2017 Supp. 21-6609;
- Order the defendant to attend and satisfactorily complete an alcohol or drug education or training program as provided by K.S.A. 2017 Supp. 21-6602(c);
- Order the defendant to repay the amount of any reward paid to aid in defendant's apprehension, any costs and expenses incurred by law enforcement to recapture defendant due to defendant's crime of escape, expenses incurred by firefighting agencies due to defendant's crime of arson, any public funds used by law enforcement to purchase controlled substances from the defendant during the investigation, any medical costs and expenses incurred by law enforcement;
- Order the defendant to pay the administrative fee authorized by K.S.A. 2017 Supp. 22-4529 unless waived by the court;
- Order the defendant to pay a domestic violence special program fee authorized by K.S.A. 20-369;

- Order the defendant to a work release program, outside the control of the Department of Corrections, if the defendant is convicted of a felony, under K.S.A. 2017 Supp. 21-6804(i), or a misdemeanor. If work release is imposed for a second or third and subsequent DUI, the offender shall be required to serve a total of 120 or 240 hours of confinement, respectively. Such hours shall be a mandatory 48 consecutive hours confinement followed by confinement hours at the end of and continuing to the beginning of the offender's work day;
- Order the defendant to pay the full amount of unpaid costs associated with the conditions of release of the appearance bond under K.S.A. 2017 Supp. 22-2802;
- Order the defendant to pay restitution, including but not limited to, damages or loss caused by the defendant's crime unless the court finds a restitution plan unworkable due to compelling circumstances and states such on the record;
- Order the defendant to submit to and complete an alcohol and drug evaluation and pay a fee for such evaluation when required by K.S.A. 2017 Supp. 21-6602(d);
- Order the defendant to reimburse the county general fund for expenditures by the county to provide counsel and other defense services to the defendant, after any order for restitution has been paid in full;
- Order the defendant to reimburse the state general fund for all or a part of the expenditures by the state board of indigent's defense services to provide counsel and other defense services to the defendant;
- Decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty pursuant to any other Kansas statute; and
- For Jessica's Law cases, in addition to any other penalty or disposition imposed by law, for any defendant sentenced to imprisonment pursuant to K.S.A. 21-4643, prior to its repeal, or K.S.A. 2017 Supp. 21-6627, and amendments thereto, for crimes committed on or after July 1, 2006, the court shall order that the defendant be electronically monitored upon release from imprisonment for the duration of the defendant's natural life and that the defendant shall reimburse the state for all or part of the cost of such monitoring as determined by the prisoner review board.

**This program is currently unavailable as a sentencing option.*

U.S. ARMED FORCES SERVICE TREATMENT

K.S.A. 2017 Supp. 21-6630 allows a defendant to assert that their offense was committed as a result of an injury from service in a combat zone while in the armed forces of the United States. If the court determines the defendant has met the criteria established by the statute and the defendant's current crime and criminal history fall within a presumptive non-prison category under the sentencing guidelines, the court may order the defendant to undergo inpatient or outpatient treatment or a program operated by the United States department of defense, the United States department of veterans affairs or the Kansas national guard, if the defendant is eligible for and consents to such treatment. More information, including forms for the certification of status, can be found on the KSSC website at <http://sentencing.ks.gov/legislation/veterans-treatment>.

FINES

Felony, misdemeanor and infraction fines are as follows in K.S.A. 2017 Supp. 21-6611:

Off-grid and drug severity level 1 or drug severity level 1 or 2 if committed on or after July 1, 2012	≤ \$500,000
Nondrug severity level 1 through 5 and drug severity level 3 and 4 or drug severity level 3 or 4 if committed on or after July 1, 2012	≤ \$300,000
Nondrug severity level 6 through 10 and drug severity level 4 or drug severity level 5 if committed on or after July 1, 2012	≤ \$100,000
Class A misdemeanor	≤ \$2,500
Class B misdemeanor	≤ \$1,000
Class C misdemeanor	≤ \$500
Traffic infraction	≤ \$500
Cigarette or Tobacco infraction	\$25

As an alternative to any of the above fines, the fine imposed may be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender. K.S.A. 2017 Supp. 21-6611(c). In addition, certain offenses have particular fines that are specified by statute.

DUI

The range of mandatory DUI fines is as follows:

- 1st DUI: not less than \$750 nor more than \$1,000
- 2nd DUI: not less than \$1,250 nor more than \$1,750
- 3rd DUI: not less than \$1,750 nor more than \$2,500
- 4th or subsequent DUI: \$2,500

Test Refusal*

The range of Test Refusal Fines is as follows:

- 1st Offense: not less than \$1,250 nor more than \$1,750
- 2nd Offense: not less than \$1,750 nor more than \$2,500
- 3rd or Subsequent Offense: \$2,500

For DUI and Test Refusal* cases, \$250 from each fine imposed for violations of K.S.A. 2017 Supp. 8-2,144, 8-1025 and 8-1567 shall be remitted to the state treasurer for deposit into the Community Corrections Supervision Fund. K.S.A. 2017 Supp. 8-2,144(p), 8-1025(n) and 8-1567(p)(2).

The mandatory fine must be imposed but the sentencing court should determine the method by which the defendant will pay it, either by payment or community service. *State v. Copes*, 290 Kan. 209, 224 P.3d 571 (2010). However, any community service ordered must be performed no later than one year from imposition. *State v. Grebe*, 46 Kan.App.3d 741, 264 P.3d 511 (2011).

**K.S.A. 8-1025 was ruled unconstitutional by State v. Ryce, 306 Kan. 682 (2017).*

Human Trafficking Crimes

Offenders who are convicted of Buying Sexual Relations shall pay a fine between \$1,200-\$5,000. Half of all fines collected shall be remitted to the Human Trafficking Victim Assistance Fund.

Offenders convicted of Promoting the Sale of Sexual Relations or Commercial Sexual Exploitation of a Child shall pay a fine of not less than \$2500 nor more than \$5000, and upon a second or subsequent

offense, shall be fined not less than \$5000. Offenders convicted of human trafficking will be fined between \$2,500-\$5,000, and offenders convicted of aggravated human trafficking shall be fined a minimum of \$5,000. All such fines will be remitted to the state treasurer for deposit into the Human Trafficking Victim Assistance Fund. K.S.A. 2017 Supp. 21-6420, 21-6421 and 21-6422.

FEES

DNA Database Fee

K.S.A. 75-724. (a) Any person convicted or adjudicated of an offense that, pursuant to K.S.A. 21-2511, and amendments thereto, requires submission of a DNA sample shall pay a separate court cost of \$200 as a Kansas bureau of investigation DNA database fee upon conviction or adjudication.

Domestic Violence Program Fee

If a judicial district creates a local fund, the court may impose a fee against any defendant for crimes involving a family or household member as provided in K.S.A. 2017 Supp. 21-5414 and against any defendant found to have committed a domestic violence offense pursuant to K.S.A. 2017 Supp. 22-4616. The chief judge of each judicial district where such fee is imposed shall set the amount of such fee by rules adopted in such judicial district in an amount not to exceed \$100 per case. K.S.A. 20-369.

Drug/Alcohol Evaluation Fee

Offenders who are convicted of a first or second violation of K.S.A. 8-2,144 (commercial DUI), a first violation of K.S.A. 8-1025 (test refusal)* or a first or second violation of K.S.A. 8-1567 (DUI) are required to undergo a drug evaluation and pay a fee of \$150. K.S.A. 8-1008.

Juveniles or adults convicted or adjudicated of having committed, while under 21 years of age, a misdemeanor under K.S.A. 8-1599, 41-719 or 41-727 or K.S.A. 2017 Supp. 21-5701 through 21-5717, shall be ordered to submit to an alcohol and drug evaluation and pay a fee of \$150. If the court finds that the person is indigent, the fee may be waived. K.S.A. 2017 Supp. 21-6602(d).

If the person is 18 or older but less than 21 and is convicted of a violation of K.S.A. 41-727 involving cereal malt beverage, the evaluation and fee are permissive and not mandatory. K.S.A. 2017 Supp. 21-6602(e).

**K.S.A. 8-1025 was ruled unconstitutional by State v. Ryce, 306 Kan. 682 (2017).*

KBI Lab Fee

The court shall order any person convicted or diverted of a misdemeanor or felony contained in chapters 21, 41 or 65 of the Kansas Statutes Annotated, or a violation of K.S.A. 8-2,144 (Commercial DUI) or 8-1567 (DUI), or a violation of a municipal ordinance or county resolution prohibiting the acts prohibited by such statutes, unless the municipality or county has an agreement with the laboratory providing services that sets a restitution amount to be paid by the person that is directly related to the cost of laboratory services, to pay a separate court cost of \$400 for every individual offense if forensic science or laboratory services, forensic computer examination services or forensic audio and video examination services are provided in connection with the investigation by the Kansas bureau of investigation; the Sedgwick county regional forensic science center; the Johnson county sheriff's laboratory; the heart of America regional computer forensics laboratory; the Wichita-Sedgwick county computer forensics crimes unit or the Garden City police department computer, audio and video forensics laboratory. K.S.A. 28-176(a) only allows for a court to impose the lab fee

upon the defendant if the defendant was convicted or adjudicated of (or diverted from the crime). *State v. Goeller*, 276 Kan. 578, 77 P.3d 1272 (2003). Such fees shall be in addition to and not in substitution for any and all fines and penalties otherwise provided for by law for such offense. K.S.A. 28-176.

Correctional Supervision Fee

The court shall order, as a condition of probation, suspension of sentence or assignment to a community corrections program, the offender to pay a correctional supervision fee of \$60 if the person was convicted of a misdemeanor, or a fee of \$120 if the person was convicted of a felony. In any case the amount of the correctional supervision fee specified by this paragraph may be reduced or waived by the judge if the person is unable to pay that amount. K.S.A. 21-6607(c)(3).

BIDS Attorney Fees

Pursuant K.S.A. 2017 Supp. 21-6604(i) and K.S.A. 22-4513, the court shall order the defendant to reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment. The amount of attorney fees to be included in the court order for reimbursement shall be the amount claimed by appointed counsel on the payment voucher for indigents' defense services or the amount prescribed by the board of indigents' defense services reimbursement tables as provided in K.S.A. 22-4522, and amendments thereto, whichever is less.

A defendant may waive the right to have a district court make the findings required by K.S.A. 22-4513(b) and may do so in a written plea agreement. If there is a knowing, voluntary, and intelligent waiver, the district court may order payment of a BIDS attorney fee without making the findings required by *State v. Robinson* 281 Kan. 538, 546, 132 P.3d 934 (2006). Include the BIDS Attorney Fee ordered and check the box if the fee was waived. See *State v. Phillips*, 289 Kan. 28, 210 P.3d 93 (2009).

Booking/Fingerprint Fee

Any person convicted or diverted, or adjudicated or diverted under a preadjudication program, pursuant to K.S.A. 22-2906 *et seq.*, K.S.A. 2017 Supp. 38-2346 *et seq.*, or 12-4414 *et seq.*, of a misdemeanor or felony where fingerprints are required pursuant to K.S.A. 21-2501, shall pay a separate court cost, not exceed \$45, if the board of county commissioners or by the governing body of a city, where a city operates a detention facility, votes to adopt such a fee as a booking or processing fee for each complaint.

Such fee shall be in addition to and not in substitution for any and all fines and penalties otherwise provided for by law for such offense. K.S.A. 12-16,119.

Children's Advocacy Center Fund Fee

On and after July 1, 2013, any defendant convicted of a crime under chapter 21 of the Kansas Statutes Annotated in which a minor is a victim, shall pay an assessment fee in the amount of \$400 to the clerk of the district court. All moneys received pursuant to this section shall be remitted to the

state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the children's advocacy center fund. K.S.A. 20-370.

SB 123 Assessment and Program Fees

Each offender who receives an SB 123 assessment should be ordered to pay the \$175 SB 123 assessment fee, regardless of whether they undergo SB 123 treatment. If SB 123 treatment is ordered, the SB 123 Assessment Fee and the \$125 SB 123 Reimbursement should be ordered together for a total of \$300. Changes in treatment cost necessitated a change in the form to reflect the accurate average reimbursement cost of an assessment. Reimbursement fees increased \$25 to maintain a requested total fee of \$300. See K.S.A. 75-52,144.

PROBATION

Duration of Probation for Felonies

For all crimes committed on or after July 1, 1993, the duration of probation in felony cases sentenced for the following severity levels is as follows (K.S.A. 2017 Supp. 21-6608(c)):

Severity Level	1	2	3	4	5	6	7	8	9	10
Nondrug	36	36	36	36	36	24	24	≤ 18	≤ 12	≤ 12
Drug (prior to July 1, 2012)	36	36	≤ 18	* ≤ 12						
Drug	36	36	36	≤ 18	* ≤ 12					

**Except for SB 123 sentences, where the standard probation term is up to 18 months. K.S.A. 2017 Supp. 21-6608(c)(4).*

The KSGA recommends probation duration periods for crimes ranked on the nondrug grid at severity levels 1 through 7, on the drug grid for severity levels 1 and 2 prior to July 1, 2012 and on the drug grid for severity levels 1 through 3 committed on or after July 1, 2012.

With three exceptions, the total period in all cases shall not exceed 60 months or the maximum period of the prison sentence that could be imposed, whichever is longer. K.S.A. 2017 Supp. 21-6608(c).

- The first exception is that the sentencing court may modify or extend the period of supervision, pursuant to a modification hearing and a judicial finding of necessity, up to a maximum of 5 years or the maximum period of the prison sentence that could be imposed, whichever is longer. K.S.A. 2017 Supp. 21-6608(c)(8).
- Second, if the defendant is convicted of nonsupport of a child, the period may be extended as long as the responsibility for support continues. K.S.A. 2017 Supp. 21-6608(c)(7).
- Third, if the defendant is ordered to pay full or partial restitution, the period may be extended as long as the amount of restitution ordered has not been paid. K.S.A. 2017 Supp. 21-6608(c)(7). Other unpaid assessments, such as costs, BIDS fee reimbursements, and lab fees are not restitution, and thus the fact that such may remain unpaid does not justify a probation extension under the statute. *State v. Hoffman*, 45 Kan. App. 2d 272, 246 P.3d 992 (2011).

The KSGA sets upper limits on probation duration periods for sentences on severity levels 8 through 10 on the nondrug grid, severity levels 3 and 4 on the drug grid prior to July 1, 2012 and severity levels 4 and 5 on the drug grid committed on or after July 1, 2012. For crimes at these severity

levels, the sentencing court may impose a longer period of probation if the court finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by the length of the probation terms provided in subsections (c)(3) and (c)(4) of K.S.A. 2017 Supp. 21- 6608. K.S.A. 2017 Supp. 21-6608(c)(5).

Duration of Probation for Misdemeanors

The period of suspension of sentence, probation or assignment to community corrections fixed by the court shall not exceed two years in misdemeanor cases, subject to renewal and extension for additional fixed periods of two years. K.S.A. 2017 Supp. 21-6608(a).

Multiple Probation Sentences

In cases of multiple nonprison sentences, the nonprison (probation) terms shall not be aggregated or served consecutively. If the underlying prison sentences for a nonprison sentence are ordered to run consecutively and the nonprison term is revoked, the offender will serve the prison terms consecutively. K.S.A. 2017 Supp. 21-6819(b)(8).

Termination and Presumptive Discharge

A nonprison sentence may be terminated by the court at any time. K.S.A. 2017 Supp. 21-6608(a).

In addition, a probationer who has been compliant with all terms of probation for a period of 12 months, has paid all restitution and has a risk assessment level of low risk is eligible for presumptive discharge from probation. The court shall grant such discharge unless the court finds clear and convincing evidence that denial of discharge will serve community safety interests. K.S.A. 2017 Supp. 21-6608(d).

Conditions of Probation

Court services and community corrections officers may recommend conditions of probation for offenders who receive a nonprison sentence. A felony offender may be sentenced to up to 60 days in county jail as a condition of probation. K.S.A. 2017 Supp. 21-6604(a)(3).

In addition to any other conditions, the court shall order the defendant to comply with each of the following conditions in K.S.A. 21-6607(c):

- obey all laws of the United States, the state of Kansas and any other jurisdiction to the laws of which the defendant may be subject;
- make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable. If the court finds a plan of restitution unworkable, the court shall state on the record in detail the reasons therefore;
- pay a correctional supervision fee of \$60 if the person was convicted of a misdemeanor or a fee of \$120 if the person was convicted of a felony. In any case the amount of the correctional supervision fee specified by this paragraph may be reduced or waived by the judge if the person is unable to pay that amount;
- reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant;
- be subject to searches of the defendant's person, effects, vehicle, residence and property by a court services officer, a community correctional services officer and any other law enforcement officer based on reasonable suspicion of the defendant violating conditions of probation or criminal activity; and
- be subject to random, but reasonable, tests for drug and alcohol consumption as ordered by a court services officer or community correctional services officer.

The court may impose any conditions that the court deems proper, including, but not limited to, requiring that the defendant in K.S.A. 21-6607(b) to:

- avoid such injurious or vicious habits, as directed by the court, court services officer or community correctional services officer;
- avoid such persons or places of disreputable or harmful character, as directed by the court, court services officer or community correctional services officer;
- report to the court services officer or community correctional services officer as directed;
- permit the court services officer or community correctional services officer to visit the defendant at home or elsewhere;
- work faithfully at suitable employment insofar as possible;
- remain within the state unless the court grants permission to leave;
- pay a fine or costs, applicable to the offense, in one or several sums and in the manner as directed by the court;
- support the defendant's dependents;
- reside in a residential facility located in the community and participate in educational, counseling, work and other correctional or rehabilitative programs;
- perform community or public service work for local governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community;
- perform services under a system of day fines whereby the defendant is required to satisfy fines, costs or reparation or restitution obligations by performing services for a period of days, determined by the court on the basis of ability to pay, standard of living, support obligations and other factors;
- participate in a house arrest program pursuant to K.S.A. 2017 Supp. 21-6609, and amendments thereto;
- order the defendant to pay the administrative fee authorized by K.S.A. 22-4529, and amendments thereto, unless waived by the court; or
- in felony cases, except for violations of K.S.A. 8-1567, and amendments thereto, be confined in a county jail not to exceed 60 days, which need not be served consecutively.

COMMUNITY CORRECTIONS TARGET POPULATION

K.S.A. 2017 Supp. 75-5291(a)(2) defines the target population of offenders for placement in a community correctional services program. This target population consists of adult offenders convicted of felony offenses who meet one of the following criteria:

- Offenders whose sentence falls within the designated border boxes on either the drug or nondrug sentencing grids;
- Who, on or after July 1, 2014, are determined to be moderate risk, high risk or very high risk by use of a statewide, mandatory, standardized risk assessment tool or instrument which shall be specified by the Kansas Sentencing Commission. The LSI-R has been approved by the KSSC as the official risk assessment tool;
- Offenders whose severity level and criminal history classification designate a presumptive prison sentence on either grid but receive a nonprison sentence as the result of a dispositional departure;
- Offenders convicted of a sex offense as defined in K.S.A. 22-4902, classified as a severity level 7 or higher, and who receive a nonprison sentence, regardless of the manner in which the sentence is

imposed;

- Offenders who are placed in a community correctional services programs as a condition of supervision following the successful completion of a conservation camp program;
- Offenders who have been sentenced to community corrections supervision pursuant to K.S.A. 2017 Supp. 21-6824, SB 123 Drug Treatment.
- Offenders who have been placed in a community correctional services program for supervision by the court for DUI pursuant to K.S.A. 2017 Supp. 8-1567;
- Juvenile offenders may be placed in community corrections programs if the local community corrections advisory board approves. However, grants from the community corrections fund administered by the Secretary of Corrections cannot be used for this service. K.S.A. 2017 Supp. 75-5291(a)(4).
- A public safety provision also allows direct revocation to prison from supervision by court services for offenders for whom a violation of conditions of release or assignment or a nonprison sanction has been established, as provided in K.S.A. 2017 Supp. 22-3716, if the sentencing court sets forth with particularity why placement in community corrections would jeopardize public safety or would not be in the best interest of the offender. K.S.A. 2017 Supp. 75-5291(a)(5).

CORRECTIONAL CONSERVATION CAMP*

The court shall consider placement of a defendant in the Labette Correctional Conservation Camp, conservation camps established by the secretary of corrections pursuant to K.S.A. 75-52,127, and amendment thereto, or a community intermediate sanction center under the following circumstances:

- prior to imposing a dispositional departure for a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid;
- prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes or, in grid blocks 3-E, 3-F, 3-G, 3-H or 3-I of the sentencing guidelines grid for drug crimes committed prior to July 1, 2012, or in grid blocks 4-E, 4-F, 4-G, 4-H or 4-I of the sentencing guidelines grid for drug crimes committed on or after July 1, 2012;
- prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes committed prior to July 1, 2012, or in grid blocks 5-C, 5-D, 5-E or 5-F of the sentencing guidelines grid for drug crimes committed on or after July 1, 2012, and whose offense does not meet the requirements of K.S.A. 2017 Supp. 21-6824, and amendments thereto;
- prior to revocation of a nonprison sanction of a defendant whose offense is classified in grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes committed prior to July 1, 2012, or in grid blocks 5-C, 5-D, 5-E or 5-F of the sentencing guidelines grid for drug crimes committed on or after July 1, 2012, and whose offense does not meet the requirements of K.S.A. 2017 Supp. 21-6824, and amendments thereto; or
- prior to revocation of a nonprison sanction of a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid or grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes or, in grid blocks 3-E, 3-F, 3-G, 3-H or 3-I of the sentencing guidelines grid for drug crimes committed prior to July 1, 2012, or in grid blocks 4-E, 4-F, 4-G, 4-H or 4-I of the sentencing guidelines grid for drug crimes committed on or after July 1, 2012.

The defendant shall not be sentenced to imprisonment if space is available in a conservation camp or a

community intermediate sanction center and the defendant meets all of the conservation camp's or a community intermediate sanction center's placement criteria unless the court states on the record the reasons for not placing the defendant in a conservation camp or a community intermediate sanction center. K.S.A. 2017 Supp. 21-6604(g).

**In practice, all the nonprison alternatives provided in K.S.A. 2017 Supp. 21-6604(g) are no longer viable placement alternatives. The Kansas Court of Appeals, in State v. Johnson, 42 Kan. App. 2d 356, 211 P.3d 861 (2009), took judicial notice that the Labette facility has ceased to operate as of June 30, 2009. The notice from the Secretary of Corrections indicated that the facility is closed for both male and female offenders. As stated in the notice, the facility is no longer available as a sentencing disposition for offenders who are subject to possible placement at the facility pursuant to K.S.A. 21-6604(g). With the closing of Labette, there is no longer any conservation camp in Kansas operated by the Department of Corrections.*

GOOD TIME

The prison sentence represents the time an offender actually serves, subject to a maximum reduction of:

- 20% good time for crimes committed on or after July 1, 1993 and prior to April 20, 1995;
- 15% good time for crimes committed on or after April 20, 1995;
- 20% good time for crimes of nondrug severity level 7-10 committed on or after January 1, 2008, crimes of drug severity level 3 or 4 committed on or after July 1, 2008, but prior to July 1, 2012, or crimes of drug severity level 3 through 5 committed on or after July 1, 2012. K.S.A. 2017 Supp. 21-6806(a) and K.S.A. 2017 Supp. 21-6821(b).

Good time credit is specific to the crime of conviction. Offenders convicted of multiple counts will earn good time at the applicable rate for the sentence they are serving.

Good time credit shall not be applied to Jessica's Law sentences. See K.S.A. 2017 Supp. 21-6623.

AGGRAVATED HABITUAL SEX OFFENDERS

Aggravated habitual sex offenders are offenders convicted of a sexually violent crime who have previously been convicted of two or more sexually violent crimes. K.S.A. 2017 Supp. 21-6626. Such offenders will be sentenced to imprisonment for life without the possibility of parole.

EXTENDED JURISDICTION JUVENILE CASES

See Special Rule #11. Under K.S.A. 2017 Supp. 38-2364(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences under K.S.A. 2017 Supp. 38-2361 and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. **An adult felony Journal Entry of Judgment form must be completed for these cases.** A box is located in the "Special Rule Applicable" section of the adult Journal Entry of Judgment form labeled "Extended Jurisdiction Juvenile Imposed," to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed and should be checked in these cases. Full description of the extended jurisdiction prosecution may be found at K.S.A. 2017 Supp. 38-2347.

SPECIAL SENTENCING RULES

PUBLIC SAFETY OFFENSES / FIREARMS FINDING

1. Person Felony Committed With a Firearm

When a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2017 Supp. 21-6804(h).

2. Aggravated Battery Against a Law Enforcement Officer

The sentence for the violation of K.S.A. 21-3415, prior to its repeal (aggravated battery against a law enforcement officer), if committed prior to July 1, 2006, which places the defendant's sentence in grid blocks 6-H or 6-I shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2017 Supp. 21-6804(g).

3. Aggravated Assault Against a Law Enforcement Officer

The sentence for the violation of K.S.A. 2017 Supp. 21-5412(d) (aggravated assault of a law enforcement officer), which places the defendant's sentence in grid blocks 6-H or 6-I shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2017 Supp. 21-6804(g).

34. Battery on a Law Enforcement Officer

A special sentencing rule exists for a violation of K.S.A. 2017 Supp. 21-5413(c)(2), battery on a law enforcement officer where **bodily harm occurs**. The sentence shall be presumptive imprisonment and shall be served consecutively to any other terms imposed. A law enforcement officer shall include a: uniformed or properly identified university campus police; state, county, or city law enforcement officer, other than a state correctional officer; judge; attorney; community corrections officer; or court services officer. K.S.A. 2017 Supp. 21-6804(r).

32. Drug Felony Committed - Firearm Carried or Possessed

If the trier of fact makes a finding that the offender carried a firearm to commit a drug felony, or possessed a firearm in furtherance of a drug felony, the sentence imposed shall be enhanced by an additional 6 months imprisonment and such additional sentence shall be presumptive imprisonment. K.S.A. 2017 Supp. 21-6805(g)(1)(A).

This special rule **DOES NOT** apply to crimes sentenced on the nondrug grid:

- K.S.A. 2017 Supp. 21-5705(d)(6)(B), Drug distribution to a minor;
- K.S.A. 21-5707, Unlawful manufacture, distribution, cultivation or possession of controlled substances using a communication facility;
- K.S.A. 21-5708, Unlawfully obtaining or selling a prescription-only drug;
- K.S.A. 21-5713, Unlawful distribution or possession of a simulated controlled substance;
- K.S.A. 21-5714, Unlawful representation that noncontrolled substance is controlled substance;

- K.S.A. 21-5710(e)(3)(A), Possess with intent to distribute or manufacture with intent to distribute any drug paraphernalia;
- K.S.A. 21-5710(e)(4)(B), Distributed or caused drug paraphernalia to be distributed to a minor or on or within 1,000 feet of any school property;
- K.S.A. 2017 Supp. 21-5706, Unlawful possession of controlled substances; and
- K.S.A. 21-5713, Unlawful distribution or possession of a simulated controlled substance on the drug grid.

33. Drug Felony Committed - Firearm Discharged

If the trier of fact makes a finding that the offender discharged a firearm when committing a drug felony, the sentence imposed shall be enhanced by an additional 18 months imprisonment and such additional sentence shall be presumptive imprisonment. K.S.A. 2017 Supp. 21-6805(g)(1)(B).

This special rule **DOES NOT** apply to crimes sentenced on the nondrug grid:

- K.S.A. 2017 Supp. 21-5705(d)(6)(B), Drug distribution to a minor;
- K.S.A. 21-5707, Unlawful manufacture, distribution, cultivation or possession of controlled substances using a communication facility;
- K.S.A. 21-5708, Unlawfully obtaining or selling a prescription-only drug;
- K.S.A. 21-5713, Unlawful distribution or possession of a simulated controlled substance;
- K.S.A. 21-5714, Unlawful representation that noncontrolled substance is controlled substance;
- K.S.A. 21-5710(e)(3)(A), Possess with intent to distribute or manufacture with intent to distribute any drug paraphernalia;
- K.S.A. 21-5710(e)(4)(B), Distributed or caused drug paraphernalia to be distributed to a minor or on or within 1,000 feet of any school property;
- K.S.A. 2017 Supp. 21-5706, Unlawful possession of controlled substances; and
- K.S.A. 21-5713, Unlawful distribution or possession of a simulated controlled substance on the drug grid.

4. Crime Committed for the Benefit of a Criminal Street Gang

If it is shown at sentencing that the offender committed any felony violation for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members, the sentence shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence and such nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2017 Supp. 21-6804(k).

11. Extended Jurisdiction Juvenile Imposed

If an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall; (1) impose one or more juvenile sentences under K.S.A. 2017 Supp. 38-2361 and, (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. **An adult felony Journal Entry of Judgment must be completed for these cases.** K.S.A. 2017 Supp. 38-2364.

35. Aggravated Endangering a Child

The sentence for violation of K.S.A. 2017 Supp. 21-5601(b) (aggravated endangering of a child), is a nondrug severity 9, person felony, and shall be served consecutively to any other term or terms of imprisonment imposed by the court. Such sentence is not a departure and is not subject to appeal. K.S.A. 2017 Supp. 21-5601(c)(2).

36. Ballistic Resistant Material

If the trier of fact makes a finding that an offender wore or used ballistic resistant material during the commission of, attempt to commit, or flight from any felony, the sentence shall be enhanced by an additional 30 months imprisonment. Such additional sentence shall be presumptive prison and shall be served consecutively to any other term or terms of imprisonment imposed. K.S.A. 2017 Supp. 21-6804(t).

38. Unlawful Sexual Relations

The sentence for a violation of K.S.A. 2017 Supp. 21-5512, and amendments thereto, shall be presumptive imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2017 Supp. 21-6804(s).

48. Law Enforcement Protection Act

If the trier of fact makes a finding beyond a reasonable doubt that an offender committed a nondrug felony offense against a law enforcement officer while that officer was engaged in performance of such officer's duty, or in whole or in part because such officer's status as a law enforcement officer, the sentence for such offense shall be increased one severity level above the appropriate level for such offense. If the offense is severity level 1, the sentence shall be life imprisonment of at least 25 years before eligibility for parole, and the offender shall not be eligible for probation or suspension, modification, or reduction of sentence. K.S.A. 2017 Supp. 21-6804(y)(1).

HABITUAL OR REPEAT OFFENSES

5. Persistent Sex Offender

The sentence for any persistent sex offender, as defined in K.S.A. 2017 Supp. 21-6804(j), whose current crime of conviction carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term. The sentence for any persistent sex offender whose current conviction carries a presumptive nonprison term shall be presumed imprisonment and shall be double the maximum duration of the presumptive imprisonment term. However, the provisions of this subsection shall not apply to any person whose current crime of conviction is a severity level 1 or 2 nondrug felony, unless such current conviction is for the crime of rape, K.S.A. 2017 Supp. 21-5503, and the offender has at least one prior conviction for rape in this state or a comparable felony from another jurisdiction. K.S.A. 2017 Supp. 21-6804(j).

12. Second or Subsequent Conviction for Manufacture of a Controlled Substance

The sentence for a second or subsequent conviction for the manufacture of a controlled substance under K.S.A. 2017 Supp. 21-5703, IF the prior conviction was for manufacture of methamphetamine, shall be double the presumptive sentence length. However, the sentencing court may reduce the sentence in an amount not to exceed 50 percent of the special sentence length increase if mitigating circumstances exist. Any decision made by the sentencing court regarding the reduction is not considered a departure and is not subject to appeal. K.S.A. 2017 Supp. 21-6805(e).

- 1) If both the current and prior convictions do not involve methamphetamine, the crime is a drug severity level 1 felony and the special sentencing rule does not apply. Priors can include a substantially similar offense from another jurisdiction in which the substance was not methamphetamine. K.S.A. 21-5703(2)(B)

- 2) If the prior conviction involved methamphetamine but the current conviction does not, the crime is a drug severity level 2 felony and the special sentencing rule applies, imposing a sentence of double the maximum duration of the presumptive term of imprisonment.
- 3) If the prior conviction did not involve methamphetamine but the current conviction does, the crime is a drug severity level 1 felony and the special sentencing rule does not apply.
- 4) If both the current and prior convictions involve methamphetamine, the crime is a drug severity level 1 felony and the special sentencing rule applies, imposing a sentence of double the maximum duration of the presumptive term of imprisonment.

26. Third or Subsequent Conviction for Drug Possession

The sentence for a third or subsequent felony conviction of K.S.A. 2017 Supp. 21-5706 shall be presumed imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2017 Supp. 21-6805(f)(1). There is no indication in the statute it would include priors that are substantially similar offenses from another state.

13. Residential Burglary with One Prior Residential, Non-Residence, or Aggravated Burglary Conviction

The sentence for the violation of burglary of a residence, K.S.A. 21-3715(a), prior to its repeal, K.S.A. 2017 Supp. 21-5807(a)(1), or an attempt or conspiracy to commit such, when the offender has a prior conviction for residential or nonresidential burglary, K.S.A. 21-3715(a) or (b), prior to its repeal; K.S.A. 2017 Supp. 21-5807(a)(1) or (a)(2) (automobile burglary is not included); aggravated burglary, K.S.A. 21-3716, prior to its repeal, K.S.A. 2017 Supp. 21-5807(b); or an attempt or conspiracy to commit such, shall be presumed imprisonment. K.S.A. 2017 Supp. 21-6804(l). There is no indication in the statute it would include priors that are substantially similar offenses from another state.

47. Residential Burglary with Criminal History C, D, or E Criminal History

This is imposed by K.S.A. 2017 Supp. 21-5807 for the crime of residential burglary. The law creates a special sentencing rule for burglary of a dwelling to make the sentence presumptive imprisonment if the offender has a criminal history score of 7C (one previous person felony and one previous nonperson felony), 7D (one previous person felony), or 7E (three or more nonperson felonies). K.S.A. 21-6804(x).

27. Burglary with Two or More Prior Convictions for Theft, Burglary or Aggravated Burglary

The sentence for a violation of burglary, K.S.A. 2017 Supp. 21-5807(a), when the offender has any combination of two or more prior convictions of theft, (K.S.A. 21-3701, prior to its repeal), burglary (K.S.A. 21-3715, prior to its repeal), aggravated burglary (K.S.A. 21-3716, prior to its repeal), theft of property as defined in K.S.A. 2017 Supp. 21-5801, burglary or aggravated burglary as defined in K.S.A. 2017 Supp. 21-5807, shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2017 Supp. 21-6804(p). There is no indication in the statute it would include priors that are substantially similar offenses from another state.

29. Felony Theft with Three or More Prior Convictions for a Felony Theft, Burglary, or Aggravated Burglary

The sentence for a violation of theft of property, K.S.A. 2017 Supp. 21-5801, when the offender has any combination of three or more prior felony convictions for theft (K.S.A. 21-3701, prior to its repeal), burglary (K.S.A. 21-3715, prior to its repeal), aggravated burglary (K.S.A. 21-3716, prior to its repeal), theft of property as defined in K.S.A. 2017 Supp. 21-5801, burglary or aggravated burglary as defined in K.S.A. 2017 Supp. 21-5807, shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section. K.S.A. 2017 Supp. 21-6804(p).

There is no indication in the statute it would include priors that are substantially similar offenses from another state.

30. Substance Abuse Underlying Factor*

The court may make findings that substance abuse is the underlying factor in the commission of crimes under special rules #27 and #29 above and place the offender in an intensive treatment program for at least 4 months if the state substance abuse facility is likely to be more effective than prison in reducing the risk of offender recidivism, serve community safety interests and promote offender reformation; return to court upon successful completion. K.S.A. 2017 Supp. 21-6804(p).

**While this option is authorized by statute, it has never been funded and is not, therefore, an available option.*

31. Third or Subsequent Criminal Deprivation of a Motor Vehicle

The sentence for a third or subsequent violation of criminal deprivation of property that is a motor vehicle pursuant to K.S.A. 2017 Supp. 21-5803(b) shall be presumptive imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2017 Supp. 21-6804(n). There is no indication in the statute it would include priors that are substantially similar offenses from another state.

16. Second Forgery

The crime of forgery is a severity level 8, nonperson felony on the nondrug grid. The sentence for a felony violation of K.S.A. 2017 Supp. 21-5823(b)(3) shall be as provided by the specific mandatory sentencing requirements of that statute unless the new conviction places the offender in the criminal history category A or B. In such case, the sentence shall be as for a severity level 8, nonperson felony. K.S.A. 2017 Supp. 21-6804(i)(1) and (2).

The specific mandatory sentencing provisions of K.S.A. 2017 Supp. 21-5823 provide that upon a first conviction for forgery, the offender is to be fined the lesser of the amount of the forged instrument or \$500. For a second conviction of forgery the offender is required to serve at least 30 days imprisonment as a condition of probation and is to be fined the lesser of the amount of the forged instrument or \$1,000. The offender is not eligible for release on probation, suspension, or reduction of sentence or parole until after serving the mandatory 30 or 45 day sentences as provided herein. K.S.A. 2017 Supp. 21-5823(b). There is no indication in the statute it would include priors that are substantially similar offenses from another state.

State v. Luttig, 40 Kan. App. 2d 1095, 199 P.3d 793 (2009) identified this shock time jail sentence as a penalty enhancement, and therefore prior convictions of forgery used to enhance the penalty could not be used for criminal history purposes. The Kansas Supreme Court affirmed this holding in *State v. Gilley*, 290 Kan. 31, 223 P.3d 774 (2010). However, 2010 House Bill 2469, effective April 8, 2010, amended K.S.A. 2010 Supp. 21-4710(d)(11) [now K.S.A. 2017 Supp. 21-6810(d)(9)], to provide for inclusion of prior offenses in the criminal history that enhance a penalty so long as they do not enhance the severity level of the offense, elevate the classification from misdemeanor to felony, or are not elements of the present crime of conviction. *State v. Pearce*, 51 Kan. App. 2d 116, 342 P.3d 963 (2015).

17. Third or Subsequent Conviction for Forgery

Upon a third or subsequent conviction of forgery the offender is required to serve at least 45 days imprisonment as a condition of probation and is to be fined the lesser of the amount of the forged instrument or \$2,500. The offender is not eligible for release on probation, suspension, or reduction of sentence or parole until after serving the mandatory 45 day sentence as provided herein. K.S.A. 2017 Supp. 21-5823(b).

State v. Luttig, 40 Kan. App. 2d 1095, 199 P.3d 793 (2009) identified this shock time jail sentence as a penalty enhancement, and therefore prior convictions of forgery used to enhance the penalty may not be used for criminal history purposes. The Kansas Supreme Court affirmed this holding in *State v. Gilley*, 290 Kan. 31, 223 P.3d 774 (2010). As noted above however, 2010 House Bill 2469, effective April 8, 2010, amended K.S.A. 2010 Supp. 21-4710(d)(11) [now K.S.A. 2017 Supp. 21-6810(d)(9)], to provide for inclusion of prior offenses in the criminal history that enhance a penalty so long as they do not enhance the severity level of the offense, elevate the classification from misdemeanor to felony, or are not elements of the present crime of conviction. *State v. Pearce*, 51 Kan. App. 2d 116, 342 P.3d 963 (2015).

9. Crime Committed While Incarcerated and Serving a Felony Sentence, or While on Probation, Parole, Conditional Release, or Postrelease Supervision for a Felony

Under any of these conditions, a new sentence shall be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2017 Supp. 21-6606 AND if the new crime of conviction is a felony, the sentencing court may sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime does not constitute a departure. K.S.A. 2017 Supp. 21-6604(f)(1), and also *State v. Allen*, 28 Kan. App. 2d 784, 20 P.3d 747 (2001). See also K.S.A. 2017 Supp. 21-6606(e)(2) (serving indeterminate sentence).

40. Felony Committed after Early Discharge where Offender would have been on Probation or Postrelease Supervision for a Felony

On and after July 1, 2013, an offender who receives presumptive discharge from probation pursuant to K.S.A. 2017 Supp. 21-6608(d) or is granted early discharge from postrelease supervision pursuant to K.S.A. 2017 Supp. 22-3717(d)(2), and commits a felony during the time in which the offender would have been under supervision had it not been for discharge, may be sentenced to prison for the new felony even if the sentence for such felony is presumptive nonprison. K.S.A. 2017 Supp. 21-6604(f)(2).

28. Crime Committed While Incarcerated in a Juvenile Correctional Facility for an Offense Which if Committed by an Adult Would be a Felony

A special rule pertains to juveniles who commit a new felony while incarcerated in a juvenile correctional facility for a crime which if committed by an adult would be a felony. In such instances, the court shall sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime does not constitute a departure. The conviction shall operate as a full and complete discharge from any obligations, except for an order of restitution, imposed on the offender arising from the offense for which the offender was committed to a juvenile correctional facility. K.S.A. 2017 Supp. 21-6604(f)(3).

10. Crime Committed While the Offender is on Release for a Felony Bond

When a new felony is committed while the offender is on release pursuant to article 28 of chapter 22 (Conditions of Release) of the Kansas Statutes Annotated, or similar provisions of the laws of another jurisdiction, a new sentence may be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2017 Supp. 21-6606 and the sentencing court may sentence an offender to imprisonment for the new conviction, even if the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime committed while on release for a felony does not constitute a departure. K.S.A. 2017 Supp. 21-6604(f)(4). However, K.S.A. 2017 Supp. 21-6606(d) indicates that any person who is convicted and sentenced for a crime committed while on release for a felony pursuant to article 28 of chapter 22 of the Kansas Statutes

Annotated shall serve the sentence consecutively to the term or terms under which the person was released. Because of this conflict, a court imposing a consecutive sentence should clarify that consecutive sentencing was done in the exercise of discretion, not because it was mandated.

37. Second or Subsequent Identity Theft or Identity Fraud

The sentence for a violation of identity theft or identity fraud as defined in K.S.A. 2017 Supp. 21-6107, or any attempt or conspiracy to commit such offense, shall be presumptive prison when the offender has a prior conviction for a violation of identity theft under K.S.A. 21-4018, prior to its repeal, or identity theft or identity fraud under this statute, or any attempt or conspiracy to commit such offense. K.S.A. 2017 Supp. 21-6804(u). There is no indication in the statute it would include priors that are substantially similar offenses from another state. Such sentence is not considered a departure and is not subject to appeal.

41. Leaving the Scene of an Accident

If the current crime of conviction is leaving the scene of an accident when the accident involves great bodily harm or the death of any person, K.S.A. 8-1602(b)(3) through (5), the following prior convictions for offenses committed on or after July 1, 2011, shall count as a person felony for criminal history purposes:

- 8-235, driving a vehicle without a license;
- 8-262, driving while license is canceled, suspended, or revoked;
- 8-287, driving while one's privileges are revoked for being a habitual violator;
- 8-291, violating restrictions on driver's license or permit;
- 8-1566, reckless driving;
- 8-1567, driving under the influence of alcohol or drugs;
- 8-1568, fleeing or attempting to elude a police officer;
- 8-1602, leaving the scene of an accident resulting in injury, great bodily harm, or death;
- 8-1605, failing to contact the owner of vehicle following an accident causing damage to unattended property;
- 40-3104, failing to obtain motor vehicle liability insurance coverage;
- Subsection (a)(3) of K.S.A. 2017 Supp. 21-5405, involuntary manslaughter committed while DUI;
- K.S.A. 2017 Supp. 21-5406, vehicular homicide; or
- A violation of a city ordinance or law of another state which would also constitute a violation of such sections. K.S.A. 2017 Supp. 21-6811(i).

42. Involuntary Manslaughter by DUI

If the current crime of conviction is involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 2017 Supp. 21-5405(a)(3), each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for any violation of K.S.A. 2017 Supp. 8-1567 (DUI) or K.S.A. 2017 Supp. 8-2,164 (Commercial DUI) or K.S.A. 2017 Supp. 8-1025 (Test Refusal)*, or a violation of a law of another state or an ordinance of any city, or resolution of any county which prohibits these acts shall count as one person felony for criminal history purposes. K.S.A. 2017 Supp. 21-5405(a)(3) and K.S.A. 2017 Supp. 21-6811(c)(2).

**K.S.A. 8-1025 was ruled unconstitutional by State v. Ryce, 306 Kan. 682 (2017). Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2017 Supp. 21-6810(d)(8).*

43. Third or Subsequent Flee and Attempt to Elude

The sentence for a third or subsequent violation of fleeing or attempting to elude a police officer, K.S.A. 8-1568, shall be presumptive imprisonment and shall be imposed consecutive to any other

term of imprisonment imposed. K.S.A. 2017 Supp. 21-6804(v). There is no indication in the statute it would include priors that are substantially similar offenses from another state. Such sentence is not considered a departure and is not subject to appeal.

44. Aggravated Battery by DUI

If current conviction is for K.S.A. 21-5413(b)(3), the first prior conviction, adjudication or diversion of K.S.A. 8-1567 (DUI), K.S.A. 8-2,144 (Commercial DUI), K.S.A. 8-1025 (Test Refusal)*, or comparable law of a different jurisdiction, shall count as a nonperson felony for criminal history purposes. Each second and subsequent prior adult conviction, diversion or juvenile adjudication of these offenses shall count as a person felony for criminal history purposes.

**K.S.A. 8-1025 was ruled unconstitutional by State v. Ryce, 306 Kan. 682 (2017). Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2017 Supp. 21-6810(d)(8).*

45. Aggravated Criminal Damage to Property

K.S.A. 21-5813(b) (Scrap Metal) and amendments thereto, when such person being sentenced has a prior conviction for any nonperson felony shall be presumptive imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal.

46. Kansas Offender Registration Act

K.S.A. 2017 Supp. 21-6804(m) provides that the sentence for a violation of K.S.A. 22-4903 or K.S.A. 2017 Supp. 21-5913(a)(2), and amendments thereto, shall be presumptive imprisonment. If an offense under such sections is classified in grid blocks 5-E, 5-F, 5-G, 5-H or 5-I, the court may impose an optional nonprison sentence as provided in K.S.A. 2017 Supp. 21-6804(q).

NONGRID OFFENSES

6. Felony DUI

Felony driving under the influence as defined in K.S.A. 2017 Supp. 8-1567 is a nongrid crime with no guidelines severity level or other connection to the KSGA. Instead, the specific sentencing provisions of the DUI statute determine the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence imposed. K.S.A. 2017 Supp. 21-6804(i). However, for a third or subsequent DUI, an offender is required to serve a mandatory post-imprisonment supervision period of one year under the supervision of community correctional services or court services, as determined by the court. Any violation of the conditions of such supervision may subject the person to revocation and imprisonment in jail for the remainder of the period of imprisonment, supervision period, or any combination or portion thereof. K.S.A. 2017 Supp. 8-1567(b)(3).

39. Felony DUI Test Refusal*

Felony DUI Test Refusal as defined in K.S.A. 2017 Supp. 8-1025 is an unclassified felony crime that is scored as a severity level 10 nonperson offense. Despite its classification on the grid, the specific sentencing provisions contained within the DUI Test Refusal statute determine the sentence. As with felony DUI, the offender cannot be sent to a state correctional facility to serve the sentence imposed. However, for a second or subsequent conviction for DUI Test Refusal, an offender is required to serve a mandatory post-imprisonment supervision period of one year under the supervision of community correctional services or court services, as determined by the court. Any violation of the conditions of such supervision may subject the person to revocation and imprisonment in jail for the remainder of the period of imprisonment, supervision period, or any combination or portion thereof. K.S.A. 2017 Supp. 8-1025(b)(3).

**K.S.A. 8-1025 was ruled unconstitutional by State v. Ryce, 306 Kan. 682 (2017). This special rule has been deleted from the sentencing forms. Prior convictions of a crime defined by a statute that has since been determined unconstitutional by*

an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2017 Supp. 21-6810(d)(8).

8. Felony Domestic Battery

Felony domestic battery, as defined in K.S.A. 2017 Supp. 21-5414(b)(3), is a nongrid person felony with no guidelines severity level or other connection to the KSGA. The specific sentencing provision of the domestic battery statute determines the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence imposed. K.S.A. 2017 Supp. 21-6804(i).

21. Animal Cruelty

Felony animal cruelty, as defined in K.S.A. 2017 Supp. 21-6412(a)(1), (a)(6) or (b)(2)(B), is a nongrid, nonperson felony with no guidelines severity level or other connection to the KSGA. The sentence for felony animal cruelty shall be as provided by the specific mandatory sentencing requirements of K.S.A. 2017 Supp. 21-6412(b)(1) or (b)(2)(B). Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2017 Supp. 21-6412 and K.S.A. 2017 Supp. 21-6804(i).

Felony animal cruelty involving a working or assistance dog, as defined in K.S.A. 2017 Supp. 21-6416(a), is a nongrid, nonperson felony with no guidelines severity level or other connection to the KSGA. The sentence for felony animal cruelty of a working or assistance dog shall be as provided by the specific mandatory sentencing requirements of K.S.A. 2017 Supp. 21-6416(b). Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2017 Supp. 21-6804(i).

FINANCE OFFENSES

25. Fraudulent Insurance Act

A fraudulent insurance act shall constitute a severity level 6, nonperson felony if the amount involved is \$25,000 or more; a severity level 7, nonperson felony if the amount involved is at least \$5,000 but less than \$25,000; a severity level 8, nonperson felony if the amount involved is at least \$1,000 but less than \$5,000; and a class C nonperson misdemeanor if the amount is less than \$1,000. Any combination of fraudulent acts occurring within a period of six consecutive months which involves \$25,000 or more shall have a presumptive prison sentence of imprisonment regardless of its location on the sentencing grid block. K.S.A. 2017 Supp. 40-2,118(e).

15. Kansas Uniform Securities Act

Any violation of the Kansas Uniform Securities Act, K.S.A. 17-12a101 *et seq.*, resulting in a loss of \$25,000 or more, shall have a presumptive sentence of imprisonment regardless of the offender's presumptive sentence as located on the nondrug grid. K.S.A. 2017 Supp. 17-12a508(a)(5).

19. Mortgage Business Act

Any person who willfully or knowingly violates any of the provisions of this act, any rule, and regulation adopted or order issued under this act commits a severity level 7 nonperson felony. A second or subsequent conviction of this act, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment. K.S.A. 2017 Supp. 9-2203(d).

20. Loan Brokers Act

Any person who willfully violates any provision of this act or knowingly violates any cease and desist order issued under this act commits a severity level 7, nonperson felony. Any violation of this act committed on or after July 1, 1993 and resulting in a loss of \$25,000 or more, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment. K.S.A. 2017 Supp. 50-1013(a).

MULTIPLE CONVICTIONS

When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, including sentences for crimes for which suspended sentences, probation or assignment to a community correctional services program have been revoked, such sentences shall run concurrently or consecutively at the discretion of the sentencing court. The sentencing judge may consider the need to impose an overall sentence that is proportionate to the harm and culpability and shall state on the record if the sentence is to be served concurrently or consecutively. K.S.A. 2017 Supp. 21-6606 and 21-6819(b). If the sentencing court is silent as to whether multiple sentences are to run consecutively or concurrently, the sentences shall run concurrently except as provided by K.S.A. 2017 Supp. 21-6606(c), (d) and (e).

CONCURRENT AND CONSECUTIVE SENTENCES

Consecutive sentencing is mandatory in certain circumstances if it will not result in a manifest injustice. K.S.A. 2017 Supp. 21-6819(a). Consecutive sentencing is generally required when imposing a sentence for:

- a felony committed while the offender was on probation, assigned to a community corrections services program, on parole, conditional release, postrelease supervision, or serving time for a felony; K.S.A. 2017 Supp. 21-6606(c),
- a felony committed while the offender was on felony bond; K.S.A. 2017 Supp. 21-6606(d), (Special Rule #10);
- a knowing or reckless violation of battery against a law enforcement officer; K.S.A. 2017 Supp. 21-6804(r), (Special Rule #34);
- aggravated endangering a child, K.S.A. 2017 Supp. 21-5601, (Special Rule #35)
- a finding that the offender wore ballistic resistant materials, in which the offender shall serve an additional 30 months' imprisonment consecutive to any other sentence, K.S.A. 2017 Supp. 21-6804(t), (Special Rule #36); and
- a felony committed while the offender was incarcerated and serving a sentence for a felony in any place of incarceration. K.S.A. 2017 Supp. 21-6606(e)(1), (Special Rule #9).

DETERMINING THE BASE SENTENCE AND PRIMARY CRIME

In all sentencing cases involving multiple convictions, the sentencing court must establish the base sentence for the primary crime. The primary crime is determined pursuant to K.S.A. 2017 Supp. 21-6819(b)(2) as follows:

- The primary crime is generally the crime with the highest severity ranking. However, an off-grid crime shall not be used as the primary crime in determining the base sentence when imposing multiple sentences. The primary on-grid offense shall be sentenced with full criminal history and forms the base sentence for the guidelines sentence. The off-grid sentence remains primary overall, but is added to the guidelines sentence or concurrent to the guidelines sentence, as determined by the court.
- In situations where more than one crime is classified in the same category, the sentencing judge must designate which crime will serve as the primary crime.
 - A presumptive imprisonment crime is primary over a presumptive nonimprisonment crime.
 - When the offender is convicted of crimes sentenced on nondrug and drug grids, the primary crime is the one that carries the longest prison term. Therefore, in sentencing with the drug grid

and nondrug, both crimes having the same presumption of probation or imprisonment, the primary crime shall be the crime with the longest sentence term.

For the “base” sentence, the offender’s full criminal history is to be applied to determine the presumptive range for that crime. However, non-base sentences will not have criminal history scores applied and shall be calculated in the criminal history I (far right) column of the grid according to the severity level of the crime. K.S.A. 2017 Supp. 21-6819(b)(3) and (b)(5).

WHEN PRIMARY CRIME IS PRISON

If the sentence for the primary crime is prison, the entire imprisonment term of the consecutive sentences will be served in prison, even if the additional crimes are presumptive nonprison. K.S.A. 2017 Supp. 21-6819(b)(6).

“DOUBLE” RULE

When consecutive sentences are imposed, the total prison sentence imposed cannot exceed twice the base sentence. This is referred to as the “double rule.” K.S.A. 2017 Supp. 21-6819(b)(4). This means that the sentencing court is not required to shorten the length of any of the individual non-base sentences given to an offender, as long as the court orders that the total sentence given to the offender is adjusted so that it does not exceed twice the base sentence. The term “base sentence” applies to the base sentence actually imposed, not to the maximum base sentence that could have been imposed according to the sentencing grid. *State v. Snow*, 282 Kan. 323, 341-42, 144 Kan. 729 (2006). The sentencing judge shall have the discretion to impose a consecutive term of imprisonment for a crime other than the primary crime of any term of months not to exceed the nonbase sentence. K.S.A. 2017 Supp. 21-6819(b)(1). This allows the court the discretion to impose less than the full sentence for each additional offense ordered to run consecutively to the primary offense.

ON-GRID AND OFF-GRID CONVICTIONS

If sentences for off-grid and on-grid (sentencing guidelines) convictions are ordered to run consecutively, the offender shall not begin to serve the on-grid sentence until paroled from the off-grid sentence, and the postrelease period will be based on the off-grid crime. K.S.A. 2017 Supp. 21-6819(b)(2).

NONPRISON SENTENCES RUN CONCURRENT

In cases of multiple nonprison sentences, the nonprison (probation) terms shall not be aggregated or served consecutively. If the underlying prison sentences for a nonprison sentence are ordered to run consecutively and the nonprison term is revoked, the offender will serve the prison terms consecutively. K.S.A. 2017 Supp. 21-6819(b)(8).

CRIMES COMMITTED PRIOR TO JULY 1, 1993

If an offender is sentenced to prison for a crime committed on or after July 1, 1993, while the offender was imprisoned for an offense committed prior to July 1, 1993, and the offender is not eligible for the retroactive application of the KSGA, the new sentence begins when the offender is paroled or reaches the conditional release date on the old sentence, whichever is earlier.

If the offender was past the offender's conditional release date at the time the new offense was committed, the new sentence begins when the offender is ordered released by the Prisoner Review Board or reaches the maximum sentence date on the old sentence, whichever is earlier.

The new sentence is then served as otherwise provided by law. The period of postrelease supervision will be based on the new sentence. K.S.A. 2017 Supp. 21-6606(e)(2).

POSTRELEASE SUPERVISION

In cases involving multiple convictions, the crime carrying the longest postrelease supervision term, including off-grid crimes, will determine the period of postrelease supervision. K.S.A. 2017 Supp. 22-3717(d)(1)(F). Postrelease supervision periods will not be aggregated.

CONSOLIDATION

Orders of consolidation should be completed in both cases. PSIs should be prepared for both cases wherein the primary offense is indicated by case and count number, as well as subsequent counts. A separate Journal Entry of Judgment form (JE) must be used for each separate case number that is consolidated with the primary case. All cases should have their own JE, including misdemeanor cases, with felony PSIs and criminal history included with felony offenses. All counts other than the primary offense in the primary case will use criminal history I.

DEPARTURES AND DEPARTURE FACTORS

Either party may file a motion seeking a departure, or the sentencing court may depart on its own motion. Any party filing a motion to depart must state in its motion the type of departure sought and the reasons relied upon. Both the prosecution and defense shall have a reasonable time to prepare for a departure hearing, and the sentencing court shall transmit to both parties, copies of the presentence investigation report prior to the hearing. The State must provide notice of a departure hearing to any victim or the victim's family, and the sentencing court shall review the victim impact statement. Parties may brief the sentencing court in writing and make oral arguments to the court at the hearing. K.S.A. 2017 Supp. 21-6817(a)(1) and (a)(3).

At the conclusion of the departure hearing or within 21 days thereafter, the sentencing court shall issue findings of fact and conclusions of law regarding the issues submitted by the parties, and shall enter an appropriate order. K.S.A. 2017 Supp. 21-6817(a)(2). Whenever the sentencing court departs from the presumptive guidelines sentence, the court must make findings of fact as to the reasons for departure regardless of whether a hearing is requested. K.S.A. 2017 Supp. 21-6817(a)(4). If a factual aspect of the current crime of conviction is an element of the crime or is used to subclassify the crime on the crime severity scale, that factual aspect may be used as an aggravating or mitigating factor to justify a departure from the presumptive sentence only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime. K.S.A. 2017 Supp. 21-6815(c)(3).

In determining aggravating or mitigating circumstances, the sentencing court shall consider:

- any evidence received during the proceeding, including the victim impact statement;
- the presentence investigation report;
- written briefs and oral arguments of either the State or counsel for the defendant; and

- any other evidence relevant to such aggravating or mitigating circumstances that the court finds trustworthy and reliable. K.S.A. 2017 Supp. 21-6815(d)(1) through (d)(4).

MITIGATING FACTORS

The following nonexclusive list of statutorily enumerated factors may be considered in determining whether substantial and compelling reasons for a downward dispositional departure exist:

- The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction;
- The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion. This factor is not sufficient as a complete defense;
- The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor;
- The defendant, or the defendant's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse; or
- The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.
- The offender committed such crime as a result of an injury, including major depressive disorder, polytrauma, post-traumatic stress disorder or traumatic brain injury, connected to service in a combat zone in the armed forces of the United States of America. K.S.A. 2017 Supp. 21-6815(c)(1)(A) through (F).

K.S.A. 2017 Supp. 21-6815(e) provides additional mitigating factors to be considered. It provides that, upon motion of the prosecutor stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who is alleged to have committed an offense, the court may consider such mitigation in determining whether substantial and compelling reasons for a departure exist. In considering this mitigating factor, the court may consider the following:

- the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the prosecutor's evaluation of the assistance rendered;
- the truthfulness, completeness and reliability of any information or testimony provided by the defendant;
- the nature and extend of the defendant's assistance;
- any injury suffered, or any danger or risk of injury to the defendant or the defendant's family resulting from such assistance; and
- the timeliness of the defendant's assistance. K.S.A. 2017 Supp. 21-6815(e).

For Jessica's Law departures, the sentencing judge may rely on the same mitigating factors to find substantial and compelling reasons for a departure from the mandatory minimum of Jessica's Law, and to support an additional departure from the default prison sentence pursuant to the sentencing guidelines act. *State v. Spencer*, 291 Kan. 796, 248 P.3d 256 (2011).

AGGRAVATING FACTORS

The following nonexclusive list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist:

- The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity that was known or should have been known to the offender;
- The defendant's conduct during the commission of the current offense manifested excessive brutality to the victim in a manner not normally present in that offense;
- The offense was motivated by the defendant's belief or perception, entirely or in part, of the race, color, religion, ethnicity, national origin or sexual orientation of the victim, whether or not the defendant's belief or perception was correct;
- The offense involved a fiduciary relationship which existed between the defendant and the victim;
- The defendant, 18 or more years of age, employed, hired, used, persuaded, induced, enticed, or coerced any individual under 16 years of age to commit or assist in avoiding detection or apprehension for commission of any person felony or any attempt, conspiracy or solicitation to commit any person felony regardless of whether the defendant knew the age of the individual was under 16 years of age;
- The defendant's current crime of conviction is a crime of extreme sexual violence and the defendant is a predatory sex offender as defined by this section;
- The defendant was incarcerated at the time the crime was committed; or
- The crime involved two or more participants in the criminal conduct, and the defendant played a major role in the crime as the organizer, leader, recruiter, manager, or supervisor. K.S.A. 2017 Supp. 21-6815(c)(2)(A) through (H).

DRUG GRID CRIMES - ADDITIONAL AGGRAVATING FACTORS

In addition to the factors listed above, the following aggravating factors which apply to drug felonies committed on or after July 1, 1993, may be considered in determining whether substantial and compelling reasons for departure exist:

- The crime was committed as part of a major organized drug manufacture, production, cultivation or delivery activity. Two or more of the following nonexclusive factors constitute evidence of major organized drug manufacture, production, cultivation or delivery activity:
 - The offender derived a substantial amount of money or asset ownership from the illegal drug sale activity;
 - The presence of a substantial quantity or variety of weapons or explosives at the scene of arrest or associated with the illegal drug activity;
 - The presence of drug transaction records or customer lists that indicate a drug sale activity of major size;
 - The presence of manufacturing or distribution materials such as, but not limited to, drug recipes, precursor chemicals, laboratory equipment, lighting, irrigation systems, ventilation, power-generation, scales or packaging material;
 - Building acquisitions or building modifications including but not limited to painting, wiring, plumbing or lighting which advanced or facilitated the commission of the offense;
 - Possession of large amounts of illegal drugs, or substantial quantities of controlled substances;
 - A showing that the offender has engaged in repeated criminal acts associated with the manufacture, production, cultivation, or delivery of controlled substances.
- The offender possessed illegal drugs:
 - With the intent to sell, which were sold or were offered for sale to a person under 18 years of age; or
 - With the intent to sell, deliver or distribute, or which were sold, or offered for sale in the immediate presence of a person under 18 years of age;

- The offender, 18 or more years of age, employs, hires, uses, persuades, induces, entices, coerces any individual under 16 years of age to violate or assist in avoiding detection or apprehension for violation of any provision of the uniform controlled substances act, or any attempt, conspiracy or solicitation to commit a violation of any provision of the uniform controlled substances act, regardless of whether the offender knew the individual was under 16 years of age;
- The offender was incarcerated at the time the crime was committed. K.S.A. 2017 Supp. 21-6816(a)(1) through (a)(4).
- In determining whether aggravating factors exist as provided in this section, the court shall review the victim impact statement. K.S.A. 2017 Supp. 21-6816(b).

DURATIONAL DEPARTURES

When imposing a departure sentence, the sentencing court should begin with the grid block corresponding to the severity level of the crime of conviction and the offender's criminal history. A sentence that is an upward durational departure cannot exceed twice the maximum presumptive sentence. There is no limit on a downward durational departure. K.S.A. 2017 Supp. 21-6818(b).

DISPOSITIONAL DEPARTURES

The sentencing court may also depart from the presumptive disposition in the case by sentencing an offender for whom the presumptive sentence is probation to prison (upward dispositional departure), or by sentencing an offender for whom the presumptive sentence is prison to a nonprison sanction (downward dispositional departure). See K.S.A. 2017 Supp. 21-6818(c) and (d). When the sentencing judge imposes a prison sentence as a dispositional departure, the term of imprisonment shall not exceed the maximum duration of the presumptive imprisonment term. If an upward dispositional departure is combined with an upward durational departure, the sentencing court must define separate substantial and compelling reasons for both departures. See K.S.A. 2017 Supp. 21-6818(c)(2). However, this requirement does not apply in the case of a downward dispositional and durational departure combination.

JESSICA'S LAW OFFENSES

When the court finds substantial and compelling reasons to impose a downward departure, the court may impose the guidelines sentence in lieu of the mandatory minimum sentence. K.S.A. 2017 Supp. 21-6627(c).

A downward departure from an off-grid Jessica's Law sentence must first depart to a guidelines sentence within the grid box reflecting the offender's criminal history and the severity level of the crime when the victim's age and the offender's age are not considered. If the sentencing judge wishes to depart from the presumptive guidelines sentence, the court must also consider whether substantial and compelling factors exist to justify a second departure from the presumptive sentence. *State v. Jolly*, 291 Kan. 842, 249 P.3d 421 (2011) and *State v. Spencer*, 291 Kan. 796, 248 P.3d 256 (2011).

CRIMES OF EXTREME SEXUAL VIOLENCE

No downward dispositional departure shall be imposed for any crime of extreme sexual violence, as defined in K.S.A. 2017 Supp. 21-6815 and the sentencing judge shall not impose a downward durational

departure for a crime of extreme sexual violence to less than 50% of the center of the range of the sentence for such crime. K.S.A. 2017 Supp. 21-6818(a).

POSTRELEASE SUPERVISION DEPARTURE FOR SEXUALLY MOTIVATED OFFENSES

If an offender is convicted of a sexually motivated crime, as defined in 2017 Supp. K.S.A. 22-3717(d)(2), the sentencing court, based upon substantial and compelling reasons stated on the record, may depart from the prescribed postrelease supervision period and place the offender on postrelease supervision for a maximum period of 60 months. This is considered a departure and is subject to appeal. K.S.A. 2017 Supp. 22-3717(d)(1)(D)(i) and (ii).

JURY TRIAL PROCEDURES FOR UPWARD DURATIONAL DEPARTURE

- If the State seeks an upward durational departure sentence, the aggravating factor(s) must first be stipulated to by defendant or proven to a unanimous jury beyond a reasonable doubt. In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), the Supreme Court held that facts (aggravators) that would increase the penalty beyond the statutory maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. The Legislature then amended K.S.A. 21-4716 [now K.S.A. 2017 Supp. 21-6815(b)] to provide a statutory framework for such a jury proceeding:
 - In *State v. Horn*, 291 Kan. 1, 8–9, 238 P.3d 238 (2010), the Kansas Supreme Court stated the prior statutory language “appears to contemplate the use of an existing trial jury in the separate departure sentence proceeding.” It then determined “that a defendant's waiver of his or her right to a jury trial on the issue of guilt mandates that the court, not a jury, will hear the evidence and make the factual findings on the existence of the asserted sentence-enhancing factor.” In the 2011 legislative session, the Kansas Legislature addressed the *Horn* decision by amending K.S.A. 2010 Supp. 21–4718(b)(4). The statute now simply provides the determination regarding an upward departure must be made by “a jury as soon as practicable.” It also notes “If the jury at the upward durational departure sentence proceeding has been waived, the upward durational departure sentence proceeding shall be conducted by the court.”
- The defendant must be informed of the right to have aggravating departure factors determined by a jury in order for such waiver to be valid. *State v. Duncan*, 291 Kan. 467, 243 P. 3d 338 (2010).
- A County or District Attorney seeking an upward durational departure must provide notice 30 days prior to the date of trial or, within 7 days from the date of the arraignment if the trial is to take place in less than 30 days from the date of the arraignment. K.S.A. 2017 Supp. 21-6817(b)(1). The court shall determine if the presentation of the evidence regarding the aggravating factors shall be presented during the trial of the matter or in the jury proceeding following the trial. K.S.A. 2017 Supp. 21-6817(b)(2).
- The jury shall determine, based on the reasonable doubt standard, whether aggravating factors exist that may serve to enhance the maximum sentence. If one or more aggravating factors are found to exist, by a unanimous jury vote, such factors shall be reported to the court on a special jury verdict form. K.S.A. 2017 Supp. 21-6817(b)(4) and (b)(7).

DEPARTURE AND CONSECUTIVE SENTENCING COMBINATION

The following shall apply for a departure from the presumptive sentence based on aggravating factors within the context of consecutive sentences:

- The court may depart from the presumptive limits for consecutive sentences only if the judge finds substantial and compelling reasons to impose a departure sentence for any of the individual crimes being sentenced consecutively. K.S.A. 2017 Supp. 21-6819(c)(1).
- When a departure sentence is imposed for any of the individual crimes sentenced consecutively, the imprisonment term of that departure sentence shall not exceed twice the maximum presumptive imprisonment term that may be imposed for that crime. K.S.A. 2017 Supp. 21-6819(c)(2).
- The total imprisonment term of the consecutive sentences, including the imprisonment term for the departure crime, shall not exceed twice the maximum presumptive imprisonment term of the departure sentence following aggravation. This, referred to as the “double-double rule”, means that the total prison term of the consecutive sentences must not be more than twice the upward departure sentence. K.S.A. 2017 Supp. 21-6819(c)(3).

Examples

An offender is convicted of kidnapping (severity level 3), aggravated burglary (severity level 5), and theft with a loss of at least \$1,000 but less than \$25,000 (severity level 9). The offender has one prior person felony conviction placing him in criminal history Category D. If the jury determines, based on the reasonable doubt standard, that substantial and compelling reasons exist to impose an upward durational departure sentence for the kidnapping, that departure may be imposed in conjunction with the imposition of consecutive sentences for the remaining convictions of aggravated burglary and theft. Both the limits on the total consecutive term and the limits applicable to upward durational departure sentences apply.

The sentencing court begins by establishing a base sentence for the primary sentence. In this fact pattern, the most serious crime of conviction is the kidnapping, with a presumed imprisonment sentence of 94 months, which becomes the base sentence. The two remaining convictions at criminal history Category I have presumptive sentences of 32 and 6 months respectively. (If the sentencing court wished only to sentence these offenses consecutively, the total sentence could not aggregate to a sum greater than two times the base without a durational departure sentence. In this hypothetical case, the greatest aggregate consecutive sentence would be 2×94 , or 188 months. Here, the total sum of $94 + 32 + 6$ would be 132 months, a consecutive sentence clearly within the limit of twice the base sentence.)

Assume that the jury establishes a finding for an upward durational departure sentence for the kidnapping conviction based on the presence of an aggravating factor and the court imposes three consecutive sentences for the three offenses in this case.

Base sentence: Kidnapping at Maximum Presumptive Sentence = 100 months

(Kidnapping at severity level 3, criminal history D on the nondrug grid)

Other sentences: Aggravated Burglary and Theft = 32 and 6 months.

(Aggravated Burglary at severity level 5, criminal history I and Theft at severity level 9, criminal history I on the nondrug grid)

The base sentence may be enhanced to a maximum departure length of up to 200 months, or two times the maximum presumptive sentence. This is the standard rule for any departure sentence. In addition, the total imprisonment term of the consecutive sentences, including the departure term, shall not exceed twice the departure of the enhanced sentence. Therefore, the aggregate consecutive sentence in this example cannot exceed 2×200 , or 400 months. The sum of $200 + 32 + 6$, or 238 months is well within the limit of 400 months.

The sentencing court may choose to depart and impose a longer sentence for the aggravated burglary and theft if independent substantial and compelling reasons exist to justify those departures. The aggregate consecutive sentence becomes $200 + 64 + 12$, or 276 months, which is still within the limit of 400 months. This sentence would represent a durational departure sentence within a consecutive sentence context, and the limits on the total duration of such a sentence are sometimes referred to as the "double-double rule." The application of the "double-double rule" allows a sentencing court considerable discretion in fashioning a sentence for exceptional cases that warrant both an upward durational departure and consecutive sentencing. See *State v. Snow*, 282 Kan. 323, 342, 144 P.3d 729 (2006) and the subsequent *State v. Snow*, 40 Kan. App.2d 747, 195 P.3d 282 (2008).

REPORTING DISPOSITIONS TO THE KANSAS SENTENCING COMMISSION

The sentencing guidelines Journal Entry of Judgment form approved by the Kansas Sentencing Commission must be completed for each felony conviction for a crime committed on or after July 1, 1993. K.S.A. 2017 Supp. 22-3426(d). The court shall forward a signed copy of the Journal Entry of Judgment, attached together with the presentence investigation report as provided by K.S.A. 2017 Supp. 21-6813 to the Kansas Sentencing Commission within 30 days after sentencing. K.S.A. 2017 Supp. 22-3439(a).

For crimes committed on or after July 1, 1993, when a convicted person is revoked for a probation violation, a Journal Entry of Probation Violation form as approved by the Kansas Sentencing Commission shall be completed by the court. K.S.A. 2017 Supp. 22-3426a. For probation revocations that result in the defendant's imprisonment in the custody of the Department of Corrections, the court shall forward a signed copy of the Journal Entry of Probation Violation to the Kansas Sentencing Commission within 30 days of final disposition. K.S.A. 2017 Supp. 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Violation, on the approved form, must still be submitted to the Kansas Sentencing Commission. See K.S.A. 2017 Supp. 74-9101(b)(5).

The Kansas Sentencing Commission staff will also review felony journal entries and notify the sentencing court in writing when a possible illegal sentence has been identified. The information gathered from the sentencing guidelines forms provides a database to assess the impact of the sentencing guidelines on state correctional resources, the impact of proposed revisions to the sentencing guidelines, and improves the availability and reliability of criminal history record information.

REPORTING DISPOSITIONS TO THE KANSAS BUREAU OF INVESTIGATION

The court shall insure that information concerning dispositions for all other felony probation revocations based upon crimes committed on or after July 1, 1993, and for all class A and B misdemeanor crimes and assault as defined in K.S.A. 2017 Supp. 21-5412, committed on or after July 1, 1993, is forwarded to the Kansas Bureau of Investigation central repository on a form or in a format approved by the Kansas Attorney General within 30 days of that final disposition. K.S.A. 2017 Supp. 22-3439(c). All district courts shall be required to electronically report all case filings and dispositions for violations of K.S.A. 2017 Supp. 8-1567 and 8-1025*, 21-5426, 21-6419, 21-6420, 21-6421 and 21-6422. K.S.A. 2017 Supp. 22-4704.

Likewise in the municipal courts, the municipal judge shall ensure that information concerning dispositions of city ordinance violations that result in convictions comparable to offenses under Kansas

criminal statutes is forwarded to the Kansas Bureau of Investigation central repository on a form or in a format approved by the Kansas Attorney General within 30 days of final disposition. K.S.A. 12-4106(e). In all cases alleging a violation of K.S.A. 2017 Supp. 8-2,144, 8-1567, 32-1131, 8-1025*, 21-6419 or 21-6241, reports of the filing and disposition of such case must be submitted electronically to the KBI central repository. K.S.A. 2017 Supp. 12-4106(f).

**K.S.A. 8-1025 was ruled unconstitutional by State v. Ryce, 306 Kan. 682 (2017). Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2017 Supp. 21-6810(d)(8).*

DNA SAMPLE COLLECTION

Offenders who are convicted of certain crimes, or adjudicated of certain juvenile offenses, shall be required to submit a DNA or biological sample to the Kansas Bureau of investigation. The details of this procedure are provided K.S.A. 2017 Supp. 21-2511.

CHAPTER VI: DRUG TREATMENT – SB 123 PROGRAM

TARGET POPULATION

K.S.A. 2017 Supp. 21-6604(n) provides a mandatory nonprison sanction of certified drug abuse treatment under community corrections supervision for certain drug possession offenders.

This target population shall be required to undergo a criminal risk-need and drug abuse assessment:

Adult offenders convicted of drug possession, (K.S.A. 2017 Supp. 21-5706) who:

- (1) have NO felony conviction(s) of drug manufacturing (K.S.A. 2017 Supp. 21-5703), drug cultivation (K.S.A. 2017 Supp. 21-5705(c)), drug distribution (K.S.A. 2017 Supp. 21-5705(a)) or unlawful use of proceeds of a drug crime (K.S.A. 2017 Supp. 21-5716);

-AND-

- (2) (A) whose offense is in the 5-C, 5-D, 5-E, 5-F, 5-G, 5-H or 5-I grids blocks of the drug grid

-OR-

- (B) whose offense is in the 5-A or 5-B grids blocks of the drug grid if:

- (i) the offender's prior person felony conviction(s) were severity level 8, 9, or 10 or nongrid offenses; AND
 - (ii) the sentencing court finds and sets forth with particularity the reasons for finding that public safety will not be jeopardized by placement of the offender in a certified drug abuse treatment program. See K.S.A. 2017 Supp. 21-6824(a).

Offenders who have been convicted of a third or subsequent violation of K.S.A. 2017 Supp. 21-5706 (or K.S.A. 65-4160 or 65-4162, prior to their repeal, or K.S.A. 2010 Supp. 21-36a06, prior to its transfer) shall not be eligible for SB 123, but shall be sentenced to prison pursuant to K.S.A. 2017 Supp. 21-6805(f).

Offenders convicted of *attempted* possession are not eligible for SB 123. *State v. Perry-Coutcher*, 45 Kan. App. 2d 911, 254 P.3d 566 (2011). Likewise, offenders convicted of conspiracy and solicitation to commit drug possession will not be eligible for SB 123 treatment.

Offenders who are residents of another state and are returning to such state pursuant to the interstate corrections compact or the interstate compact for adult offender supervision, or who are not lawfully present in the United States and being detained for deportation, are not eligible for treatment under SB 123 and shall be sentenced as otherwise provided by law. K.S.A. 2017 Supp. 21-6824(h).

CRIMINAL RISK-NEED AND DRUG ABUSE ASSESSMENTS

As part of the presentence investigation, offenders who meet the requirements of K.S.A. 2017 Supp. 21-6824(a), unless otherwise specifically ordered by the court, shall be subject to a drug abuse assessment and a criminal risk-need assessment. Both assessments must be completed prior to sentencing. However, those offenders who score Low or Low/Moderate on the LSI-R criminal risk-need assessment need not be subject to a drug abuse assessment unless otherwise ordered by the court.

The Kansas Sentencing Commission has adopted the use of the LSI-R (Level of Service Inventory – Revised) as the mandatory criminal risk-need assessment and the SASSI (Substance Abuse Subtle Screening Inventory) as the mandatory drug abuse assessment.

The presentence criminal risk-need assessment shall be conducted by a court services officer or a community corrections officer. Offenders shall be assigned a risk status based on the results of the assessment. K.S.A. 2017 Supp. 21-6824(b).

The presentence drug abuse assessment shall be conducted by a drug abuse treatment program certified by the secretary of corrections to provide assessment and treatment services and shall include a clinical interview and a recommendation concerning drug abuse treatment for the offender. See K.S.A. 2017 Supp. 75-52,144(b).

The risk-need assessment and drug abuse assessment are only available to the parties, the sentencing judge, the department of corrections and if requested, the Kansas Sentencing Commission. K.S.A. 2017 Supp. 21-6813(c).

QUALIFICATION FOR TREATMENT

As of July 1, 2012, participation in SB 123 treatment has been limited to include only those offenders who have both moderate to high criminal risk-need and high drug abuse assessment scores. Those offenders who score Low or Low/Moderate on the LSI-R criminal risk-need assessment need not be subject to a drug abuse assessment unless otherwise ordered by the court.

If the offender is assigned a high risk status as determined by the drug abuse assessment performed pursuant to subsection (b)(1) and a moderate or high risk status as determined by the criminal risk-need assessment performed pursuant to subsection (b)(2), the sentencing court shall commit the offender to treatment in a drug abuse treatment program, under community corrections supervision, until the court determines the offender is suitable for discharge by the court. The term of treatment shall not exceed 18 months. K.S.A. 2017 Supp. 21-6824(c) and (d)(1). Even if the offender's criminal history places them in a border box on the drug grid (5C and 5D), SB 123 treatment is mandatory if the offender meets the criteria outlined in K.S.A. 2017 Supp. 21-6824. *State v. Swazey*, 51 Kan. App. 2d, 357 P.3d 893 (2015).

If the offender's risk-need assessment and drug abuse assessment scores do not qualify the offender for treatment, the offender will be supervised by either court services or community corrections, depending on the results of the criminal risk-need assessment. K.S.A. 2017 Supp. 21-6824(d)(2).

The court may order an offender who otherwise does not meet the assessment score requirements of subsection (c) to undergo one additional drug abuse assessment while such offender is on probation. Such offender may be ordered to undergo drug abuse treatment pursuant to subsection (a) if such offender is determined to meet the requirements of subsection (c). The cost of such assessment shall be paid by such offender. K.S.A. 2017 Supp. 21-6824(i).

See Appendix E (SB 123 flow chart).

PAYMENT OF FEES

All offender assessments, regardless of whether the offender is sentenced for SB 123 treatment, will initially be paid by the Kansas Sentencing Commission. K.S.A. 2017 Supp. 75-52-144(d).

The sentencing court shall determine the extent, if any, that such person is able to pay for such assessment and treatment. Such payments shall be used by the supervising agency to offset costs to the state. If such financial obligations are not met or cannot be met, the sentencing court shall be notified for the purpose of collection or review and further action on the offender's sentence. K.S.A. 2017 Supp. 75-52,144(d). For those assessed but not eligible for treatment, it is requested that a \$175 assessment fee be ordered at sentencing. For those sentenced to SB 123 treatment, a minimum \$175 assessment fee and a \$125 reimbursement fee for treatment costs continues to be requested to be ordered by the court at sentencing along with other fees and court costs. If the court determines that the offender has the ability to pay a larger portion of the SB 123 treatment cost, the court may order such offender to do so.

In a plea agreement situation, the court may direct the defendant to undergo the assessments at any time in order to determine SB 123 eligibility. The defendant will still be responsible for payment of all assessment fees imposed by the court at sentencing.

Please refer to SB 123 Alternatives Sentencing Policy for Drug Offenders Operations Manual for further information concerning treatment parameters located at <http://www.sentencing.ks.gov/sb-123>.

LENGTH OF TREATMENT

The term of treatment shall not exceed 18 months, beginning upon the date the offender initially begins treatment. The term of treatment may not exceed the term of probation. K.S.A. 2017 Supp. 21-6824(c). The court may extend the term of probation, pursuant to K.S.A. 2017 Supp. 21-6608(c)(3).

CONDITION VIOLATIONS

VIOLATION SANCTIONS

Offenders who violate a condition of the drug treatment program shall be subject to a nonprison sanction of up to 60 days in county jail, fines, community service, intensified treatment, house arrest or electronic monitoring. K.S.A. 2017 Supp. 22-3716(g).

In addition, an offender in SB 123 may be subject to sanctions for probation violations pursuant to K.S.A. 2017 Supp. 22-3716(c)(1). For more information on Probation Violations, see Chapter VIII.

REVOCATION OF PROBATION

If the defendant fails to participate in or has a pattern of intentional conduct that demonstrates the offender's refusal to comply with or participate in the treatment program, as established by judicial finding, the defendant shall be subject to revocation of probation and shall serve the underlying prison sentence as established in K.S.A. 2017 Supp. 21-6805. K.S.A. 2017 Supp. 21-6604(n) and 21-6824(f).

Offenders in SB 123 may also be revoked pursuant to the provisions of K.S.A. 22-3716(c). Condition violations may result in discharge from the mandatory drug abuse treatment. See *State v. Gumfory*, 281 Kan. 1168, 135 P.3d 1191 (2006).

The amount of time spent participating in the SB 123 program shall not be credited as service on the underlying prison sentence. K.S.A. 2017 Supp. 21-6604(n).

POSTRELEASE SUPERVISION

Offenders who complete SB 123 treatment and do not have their probation revoked will not be subject to postrelease supervision.

Offenders in the SB 123 program whose crime of conviction was committed prior to July 1, 2013 and who have their probation revoked, shall not be subject to a period of postrelease supervision upon completion of the underlying prison sentence. K.S.A. 2017 Supp. 21-6604(n)(2)(A).

Offenders in the SB 123 program whose crime of conviction was committed on or after July 1, 2013, shall serve a period of postrelease supervision if their probation is revoked or their underlying prison term expires while serving a 120/180-day prison sanction pursuant to subsection (c)(1)(C) or (c)(1)(D) of K.S.A. 2017 Supp. 22-3716. K.S.A. 2017 Supp. 21-6604(n)(2)(B).

CONSERVATION CAMP*

Offenders whose offense is classified in the 4-E or 4-F drug grid blocks prior to July 1, 2012, or on and after July 1, 2012, grid blocks 5-C, 5-D, 5-E or 5-F, but does not qualify for the SB 123 drug treatment program, must be considered for the Labette Correctional Conservation Camp before a sentencing court may impose a dispositional departure. K.S.A. 2017 Supp. 21-6604(g).

The Secretary of Corrections may also make direct placement to Labette Correction Conservation Camp for offenders whose offense is classified in the 5-C, 5-D, 5-E or 5-F drug grid blocks if those offenders do not otherwise meet the requirements of K.S.A. 2017 Supp. 21-6824. K.S.A. 2017 Supp. 21-6604(l).

**In practice, all the nonprison alternatives provided in K.S.A. 2017 Supp. 21-6604(g) are no longer viable placement alternatives. The Kansas Court of Appeals, in State v. Johnson, 42 Kan. App. 2d 356, 211 P.3d 861 (2009), took judicial notice that the Labette facility has ceased to operate as of June 30, 2009. The notice from the Secretary of Corrections indicated that the facility is closed for both male and female offenders. As stated in the notice, the facility is no longer available as a sentencing disposition for offenders who are subject to possible placement at the facility pursuant to K.S.A. 2017 Supp. 21-6604(g). With the closing of Labette, there is no longer any conservation camp in Kansas operated by the Department of Corrections.*

CHAPTER VII: OFFENDER REGISTRATION

For a listing of offenses that require registration, please refer to the statutory crime listing in Appendix D. Offenses requiring registration are marked with an “**R**”.

LENGTH OF REGISTRATION REQUIREMENT

The Kansas Offender Registration Act requires offenders who are convicted of certain crimes to register as an offender for a duration of either 15 years, 25 years or for the lifetime of the offender. The length of registration for each crime is provided in K.S.A. 2017 Supp. 22-4906, and on page two of the Offender Registration Supplement of the Journal Entry of Judgment.

Any person who has been declared a sexually violent predator pursuant to K.S.A. 2017 Supp. 59-29a01 *et seq.* shall be required to register for life. K.S.A. 2017 Supp. 22-4906(e).

An offender who is convicted of two or more offenses requiring registration shall be required to register for life. K.S.A. 2017 Supp. 22-4906(c).

Convictions or adjudications which result from or are connected with the same act, or result from crimes committed at the same time, shall be counted for the purpose of this section as one conviction or adjudication. A conviction or adjudication from any out of state court shall constitute a conviction or adjudication for purposes of the act. K.S.A. 2017 Supp. 22-4902(g).

OFFENDER REGISTRATION TYPE

Offenders will be required to register as either a sex offender, violent offender or drug offender, depending on their crime of conviction. See K.S.A. 2017 Supp. 22-4902 and page one of the Offender Registration Supplement of the Journal Entry of Judgment. An offender who commits multiple crimes may be required to register as multiple types of offender simultaneously.

DUTIES OF THE SENTENCING COURT

At the time of conviction or adjudication for an offense requiring registration, the court is required to inform the offender, on the record, of the procedure to register and the duties of the offender pursuant to the act. K.S.A. 2017 Supp. 22-4904(a)(1)(A).

In addition, if the offender is being released, the court shall:

- Complete a notice of duty to register, which shall include title and statute number of conviction or adjudication, date of conviction or adjudication, case number, county of conviction or adjudication, and the following offender information: Name, address, date of birth, social security number, race, ethnicity and gender;
- require the offender to read and sign the notice of duty to register, which shall include a statement that the requirements provided in this subsection have been explained to the offender;
- order the offender to report within 3 business days to the registering law enforcement agency in the county or tribal land of conviction or adjudication and to the registering law enforcement agency in any place where the offender resides, maintains employment or attends school, to complete the registration form with all information and any updated information required for registration as provided in K.S.A. 2017 Supp. 22-4907, and

- provide one copy of the notice of duty to register to the offender and, within three business days, send a copy of the form to the law enforcement agency having initial jurisdiction and to the Kansas bureau of investigation. K.S.A. 2017 Supp. 22-4904(a)(1)(B).

At the time of sentencing or disposition for an offense requiring registration as provided in K.S.A. 2017 Supp. 22-4902, and amendments thereto, the court shall ensure the age of the victim is documented in the journal entry of conviction or adjudication. K.S.A. 2017 Supp. 22-4902(a)(2).

VIOLATION OF THE ACT

Offenders who fail to comply with the provisions of the offender registration act shall be subject to the penalties provided in K.S.A. 2017 Supp. 22-4903. Upon a first offense, violation of the act is a severity level 6 person felony, and upon a second offense, a level 5 person felony. Offenses which continue for more than 30 consecutive days shall constitute a new and separate offense every 30 days thereafter. K.S.A. 2017 Supp. 22-4903(a).

An act which continues for more than 180 consecutive days is an aggravated offense, which is a severity level 3 person felony. Any aggravated violation of the Kansas offender registration act which continues for more than 180 consecutive days shall, upon the 181st consecutive day, constitute a new and separate offense, and shall continue to constitute a new and separate violation of the Kansas offender registration act every 30 days thereafter, or a new and separate aggravated violation of the Kansas offender registration act every 180 days thereafter, for as long as the violation continues. K.S.A. 2017 Supp. 22-4903(b).

Such violation shall be designated as a person or nonperson crime in accordance with the designation assigned to the underlying crime for which the offender is required to be registered under the Kansas offender registration act. If the offender is required to be registered under both a person and nonperson underlying crime, the violation shall be designated as a person crime. See K.S.A. 2017 Supp. 22-4903(c)(1)(C), (c)(2) and (c)(3)(B).

CRIMINAL HISTORY CALCULATION

An element of the crime of violating requires that an offense requiring registration be committed. Therefore, the offense giving rise to the registration requirement may not be counted in the offender's criminal history when the current crime of conviction is violation of the offender registration act. See K.S.A. 2017 Supp. 21-6810(d)(9).

However, all other prior convictions, including other convictions for offenses requiring registration, may be counted and scored unless otherwise prohibited. If an offender is required to register due to a prior case with multiple counts, and the offender was convicted of more than one count of crimes requiring registration, then one count will serve as an element of the crime of failure to register and the other count(s) may be scored as part of the criminal history. *State v. Deist*, 44 Kan.App.2d 655, 239 P.3d 896 (2010).

CHAPTER VIII: PROBATION VIOLATIONS AND REVOCATION

Please note the change in the terminology of the word “revoke.” Under the framework imposed by 2013 House Bill 2170 and further amendments thereafter, a court may no longer revoke and subsequently reinstate probation. Rather, the court may now impose sanctions, lengthen the period of probation and modify the conditions of probation without revocation. “Revocation” now means that the offender is being sent to prison to serve the underlying sentence and will no longer be eligible for reinstatement. For all instances in which the court wants to impose a quick dip or 120/180-day prison sanction, extend the length of probation or modify the conditions of probation, the court should not revoke probation.

PROBATION SANCTIONS

2013 House Bill 2170 created graduated sanctions that require a probation violator to be incarcerated for a period of time determined in part by the number of previous probation violations the offender has committed. 2014 Senate Substitute for House Bill 2448 went into effect on July 1, 2014 and amended these provisions further. Please see <http://www.sentencing.ks.gov/hb-2170/s-sub-for-hb-2448> for more information on these changes.

See Appendix E (Graduated Felony Sanctions Flow Chart).

QUICK DIPS

An offender who commits a probation violation may be subject to a “quick dip” sanction of 2 or 3 days in the county jail. 2 or 3-day “quick dip” sanctions may be used by the court or a supervising officer for offenders on probation for misdemeanor, nongrid felony and felony convictions. This sanction may also be imposed for multiple subsequent violations, not to exceed 18 total days during the offender’s term of supervision, including all quick dip sanctions imposed by both the court and all supervising officers. K.S.A. 2017 Supp. 22-3716(b)(3)(B)(ii) and (c)(1)(B).

Supervising Officer Quick Dip Authority

K.S.A. 2017 Supp. 22-3716(b)(4)(A) gives court services officers, and (b)(4)(B) gives community corrections officers, the authority to impose a ‘quick dip’ sanction if the offender waives the right to a revocation hearing on an alleged probation violation. If the offender does not waive the right to a revocation hearing, the supervising officer may not impose a quick dip, but at the revocation hearing the court may impose any of the sanctions provided by statute in K.S.A. 2017 Supp. 22-3716(b)(3)(B) for nongrid felonies and misdemeanors, and K.S.A. 2017 Supp. 22-3716(c)(1) for felonies.

The sentencing court may choose to withhold this authority from the court services or community corrections officer at sentencing. The Journal Entry of Sentencing in 2013 and all subsequent years include a check box where this authority may be specifically withheld.

The total of all sanctions imposed by supervising officers and the court must not exceed 18 total days during the offender’s term of supervision.

The supervising officer must have the concurrence of their chief court services officer or community corrections director, respectively, and must not have had the authority to impose such sanction withheld by the sentencing court. See also K.S.A. 2017 Supp. 21-6604(s) and (t).

COURT SANCTIONS IN MISDEMEANOR AND NONGRID FELONY PROBATION CASES

The court may order an offender who commits a probation violation while on probation for a misdemeanor or nongrid felony to:

- Continuation or modification of probation and a county jail sanction of up to 60 days;
- a “quick dip” sanction of 2 or 3 days in a county jail, not to exceed 18 total days (including quick dips imposed by supervising officers) during the term of supervision; or
- revocation of probation and requiring the offender to serve the sentence imposed or any lesser sentence. See K.S.A. 2017 Supp. 22-3716(b)(3)(B).

See Appendix E (Graduated Felony Sanctions Flow Chart).

COURT SANCTIONS IN FELONY PROBATION CASES

Quick Dips

The court may sentence an offender who commits a probation violation to a “quick dip” sanction of 2 or 3 days in county jail. This sanction may also be imposed for multiple subsequent violations, not to exceed 18 total days during the offender’s term of supervision, including all quick dip sanctions

120 or 180-day Prison Sanctions

If a felony offender who has previously received a “quick dip” sanction from either the court or a supervising officer commits another violation of the terms of their probation, the court may impose a sanction of 120 or 180 days to be served in the custody of the secretary of corrections. The secretary shall have the discretion to reduce the length of such sanction by up to half. K.S.A. 2017 Supp. 21-3716(c)(1)(C) and (c)(1)(D).

120 or 180-day sanctions shall begin upon pronouncement of such sanction by the court. Prior incarceration time, such as the time an offender spends awaiting a probation violation hearing, shall not be counted towards service on the prison sanction. However, time spent in county jail awaiting transport to a DOC facility after imposition of the sanction may be counted. K.S.A. 2017 Supp. 21-3716(c)(1)(C) and (c)(1)(D).

Probation condition violators are required to be placed in a community corrections program at least once prior to placement in a state correctional facility pursuant to K.S.A. 2017 Supp. 22-3716(c)(2), unless the offender has committed a new crime, has absconded from supervision, or the court finds that the safety of the members of the public will be jeopardized or the welfare of the inmate will not be served by such assignment to community corrections. K.S.A. 2017 Supp. 22-3716(c)(4), (c)(8) and (c)(9).

Upon completion of a prison sanction, the offender shall be returned to community corrections supervision. K.S.A. 2017 Supp. 22-3716(c)(6).

K.S.A. 2017 Supp. 22-3716(c)(8)(B)(i) and (ii) allows a court to continue or modify conditions of

release for or impose a 120- or 180-day prison sanction on an offender who absconds from supervision, without having to first impose a 2- or 3-day jail sanction.

Revocation of Probation

If the offender has previously received a 120 or 180-day prison sanction, the court may revoke probation and require the offender to serve their underlying prison sentence, or a portion thereof, in the custody of the secretary of corrections. K.S.A. 2017 Supp. 22-3716(c)(1)(E).

The court may revoke the probation of an offender who commits a new crime or absconds from supervision, and require them to serve their underlying prison sentence regardless of previous graduated sanctions, or lack thereof. K.S.A. 2017 Supp. 22-3716(c)(8).

The court may revoke a probation violator's probation by finding and setting forth with particularity the reasons why public safety will be jeopardized or the offender's welfare will not be served, regardless of previous graduated sanctions, or lack thereof. K.S.A. 2017 Supp. 22-3716(c)(9).

The court may revoke a probation violator's probation if the offender was granted probation as the result of a dispositional departure. K.S.A. 2017 Supp. 22-3716(c)(9).

60-Day County Jail Sanction

County jail sanctions of up to 60 days may be imposed for a violation, however they do not count towards the graduated sanction scheme and may not be imposed at the same time as any other sanction. K.S.A. 2017 Supp. 22-3716(c)(11).

No Imposition of Consecutive Sanctions While On Concurrent Probation Terms

If an offender is serving multiple probation terms concurrently, any violation sanctions imposed pursuant to subsection (c)(1)(B), (c)(1)(C) or (c)(1)(D), or any sanction imposed pursuant to subsection (c)(11), shall be imposed concurrently. K.S.A. 2017 Supp. 22-3716(c)(10).

Retroactivity of Sanction Authority

2014 Senate Sub. for House Bill 2448 added new language to clarify that graduated sanctions may be used for any felony probation violation occurring after July 1, 2013, regardless of the date the crime was committed or sentenced. K.S.A. 2017 Supp. 22-3716(c)(12).

New Felony Committed During Probation or Presumptive Discharge Period

When an offender is sentenced for a crime committed while the offender was on felony probation or other felony nonprison status, a consecutive sentence is mandated by K.S.A. 2017 Supp. 21-6606(c). If the new offense is a felony, the sentencing court may sentence the offender to prison, even if such offense otherwise presumes a nonprison sentence. K.S.A. 2017 Supp. 21-6604(f).

On and after July 1, 2013, an offender who receives presumptive discharge from probation pursuant to K.S.A. 2017 Supp. 21-6608(d) and commits a felony during the time in which the offender would have been under supervision had it not been for the early discharge, may be sentenced to prison for the new felony even if the sentence for such felony is presumptive nonprison (Special Rule #40). K.S.A. 2017 Supp. 21-6604(f)(2).

POSTRELEASE SUPERVISION

Offenders who successfully complete probation or a nonprison sanction are not required to serve a period of postrelease supervision.

For crimes committed on and after July 1, 2013, an offender who is revoked from a nonprison sanction and ordered to serve their underlying prison sentence or completes their underlying prison term while serving a 120 or 180-day graduated sanction, the offender shall be required to complete a period of postrelease supervision. K.S.A. 2017 Supp. 22-3716(f).

For crimes committed prior to July 1, 2013, notwithstanding any law to the contrary, an offender whose nonprison sanction is revoked shall not serve a period of postrelease supervision upon the completion of the prison portion of such sentence. However, offenders who have received a nonprison sanction as a result of a dispositional departure, a border box offense conviction, or a sexually motivated or sexually violent crime conviction, may be required to serve a period of postrelease upon revocation of the nonprison sanction. K.S.A. 2012 Supp. 22-3716(e). This section was repealed by 2013 House Bill 2170.

CHAPTER IX: APPEALS

APPELLATE REVIEW PRINCIPLES – K.S.A. 2017 SUPP. 21-6820

A departure sentence can be appealed by the defendant or the state to the appellate courts in accordance with rules adopted by the Supreme Court. K.S.A. 2017 Supp. 21-6820(a). Pending review of the sentence, the sentencing court, or the appellate court may order the defendant confined or placed on conditional release, including bond. K.S.A. 2017 Supp. 21-6820(b). On appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review:

- Any sentence within the presumptive range in the appropriate grid block of the sentencing grid; or
- Any sentence resulting from a plea agreement between the state and the defendant as accepted by the sentencing court on the record. K.S.A. 2017 Supp. 21-6820(c).

Appellate review for a departure sentence is limited to whether the court's findings of fact and reasons justifying departure are supported by evidence on the record and constitutes substantial and compelling reasons for departure. K.S.A. 2017 Supp. 21-6820(d). A defendant's allegation that there was a constitutional error in an individual presumptive sentence does not grant the appellate court jurisdiction to review the sentence. *State v. Huerta*, 291 Kan. 831, 247 P.3d 1043 (2011). In any appeal, the appellate court may review a claim that:

- A departure sentence resulted from partiality, prejudice, oppression or corrupt motive;
- The sentencing court erred in including or excluding a prior conviction or juvenile adjudication for criminal history scoring purposes; or
- The sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes. K.S.A. 2017 Supp. 21-6820(e).

The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing. K.S.A. 2017 Supp. 21-6820(f). In the event a conviction designated as the primary crime in a multiple conviction case is reversed on appeal, the appellate court shall remand the multiple conviction case for resentencing. Upon resentencing, if the case remains a multiple conviction case, the court shall follow all of the provisions of K.S.A. 2017 Supp. 21-6819 concerning the sentencing of multiple conviction cases. K.S.A. 2017 Supp. 21-6819(b)(5).

The sentencing court shall retain authority irrespective of any notice of appeal for 90 days after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors. K.S.A. 2017 Supp. 21-6820(i).

CHAPTER X: POSTRELEASE SUPERVISION

Upon completion of the prison portion of the sentence, all inmates who committed their crime of conviction on or after July 1, 2013 will be released to serve a term of postrelease supervision.

For crimes committed on and after July 1, 2013, if an offender is revoked from a nonprison sanction and ordered to serve their underlying prison sentence or completes the underlying prison term while serving a 120/180 day graduated sanction, such offender shall be required to complete a period of postrelease supervision. K.S.A. 2017 Supp. 22-3716(e).

For crimes committed prior to July 1, 2013, notwithstanding any law to the contrary, an offender whose nonprison sanction is revoked shall not serve a period of postrelease supervision upon the completion of the prison portion of such sentence. However, offenders who have received a nonprison sanction as a result of a dispositional departure, a border box offense conviction, or a sexually motivated or sexually violent crime conviction, may be required to serve a period of postrelease upon revocation of the nonprison sanction. K.S.A. 2012 Supp. 22-3716(e) (section repealed by 2013 House Bill 2170).

LENGTH OF SUPERVISION

The Prisoner Review Board reviews release plans. However, the Board is unable to make any changes regarding prison release dates for offenders sentenced under the KSGA. K.S.A. 2017 Supp. 22-3717(i).

CRIME	LENGTH OF POSTRELEASE
NONDRUG Level 1,2,3 or 4 DRUG Level 1, 2 or *3	36 MONTHS, except that offenders sentenced for severity levels 1 through 4 of the nondrug grid and severity levels 1 and 2 of the drug grid, for crimes committed prior to April 20, 1995 may receive a postrelease supervision period of 24 months. K.S.A. 22-3717(d)(1)(A).
NONDRUG Level 5 or 6 DRUG Level ^3 or *4	24 MONTHS K.S.A 22-3717(d)(1)(B)
NONDRUG Level 7, 8, 9 or 10 DRUG Level ^4 or *5	12 MONTHS K.S.A 22-3717(d)(1)(C)
Sexually Motivated Crime	Up to 60 months K.S.A. 22-3717(d)(1)(D)(i)

**= for crimes committed on and after July 1, 2012 only*

^= for crimes committed prior to July 1, 2012 only

GOOD TIME CREDIT

On after July 1, 2013 offenders, other than offenders whose term of imprisonment includes a sentence for a sexually violent crime, a sexually motivated crime, electronic solicitation or unlawful sexual relations, will not have their good time and program credit earned while incarcerated added to the end of their period of postrelease supervision. K.S.A. 2017 Supp. 22-3717(d). Sex offenders will still be required to serve any good time and program credit earned while in prison under postrelease supervision. K.S.A. 2017 Supp. 22-3717(d)(1)(D).

K.S.A. 2017 Supp. 22-3717(s) states that all modifications to the period of postrelease as provided in subsection (t) shall be applied retroactively. K.S.A. 2017 Supp. 22-3717(t) requires the department of corrections to modify the periods of postrelease supervision of offenders who were sentenced prior to July 1, 2013 in order to apply the new rule that good time and program credit will no longer be required to be added on to the offender's period of postrelease supervision.

REDUCTION OF POSTRELEASE SUPERVISION PERIOD

Offenders sentenced to a 36 or 24-month period of postrelease supervision may have their period of supervision reduced by up to 12 months, and offenders sentenced to a period of 12 months may have their period of supervision reduced by up to 6 months, based on the offender's compliance and overall performance while on postrelease supervision. K.S.A. 2017 Supp. 22-3717(d)(1)(E).

The Prisoner Review Board may grant an offender early discharge from their period of postrelease supervision if such offender petitions the Board for early release and has paid all restitution. K.S.A. 2017 Supp. 22-3717(d)(2).

MULTIPLE CONVICTION CASES

In cases involving multiple convictions, the crime carrying the longest postrelease supervision term, including off-grid crimes, will determine the period of supervision. Postrelease supervision periods will not be aggregated. K.S.A. 2017 Supp. 22-3717(d)(1)(F).

SEXUALLY MOTIVATED CRIME DEPARTURES

If an offender is convicted of a sexually motivated crime, as defined in K.S.A. 2017 Supp. 22-3717(d)(2), the sentencing court, based upon substantial and compelling reasons stated on the record, may depart from the prescribed postrelease supervision period and place the offender on postrelease supervision for a maximum period of 60 months. This is considered a departure and is subject to appeal. K.S.A. 2017 Supp. 22-3717(d)(1)(D)(i) and (ii).

The Prisoner Review Board may, in its discretion, grant early discharge from this extended postrelease supervision period upon completion of any treatment programs, payment of all restitution and completion of the longest presumptive postrelease supervision period associated with any of the crimes for which the prison sentence was being served. K.S.A. 2017 Supp. 22-3717(d)(1)(D)(vi).

JESSICA'S LAW AND SEXUALLY VIOLENT OFFENSE SUPERVISION

Offenders convicted of certain Jessica's Law offenses as provided in K.S.A. 2017 Supp. 21-6627, wherein the offender was 18 years of age or older and the victim was less than 14 years of age, committed on or after July 1, 2006, shall be placed on parole for life and shall not be discharged from supervision by the Prisoner Review Board. When the Prisoner Review Board orders the parole of an inmate, the Board shall also order that the inmate be electronically monitored for the duration of the inmate's natural life. K.S.A. 2017 Supp. 22-3717(u).

The court shall order that any defendant sentenced pursuant to K.S.A. 2017 Supp. 21-6627 (Jessica's Law) shall, upon release from imprisonment, be electronically monitored for the duration of the defendant's life. K.S.A. 2017 Supp. 21-6604(r).

An offender who is given a downward departure from the mandatory minimum to the guidelines sentence, shall, upon completion of the prison sentence, be subject to postrelease supervision.

An offender convicted of any sexually violent crime, as defined in K.S.A. 2017 Supp. 22-3717(d)(5), committed on or after July 1, 2006, other than a Jessica's Law offense, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life. K.S.A. 2017 Supp. 22-3717(d)(1)(G).

OTHER OFF-GRID OFFENSES

In the discretion of the Prisoner Review Board, offenders convicted of an off-grid crime may be granted parole after the offender has served the mandatory minimum prison sentence. The Prisoner Review Board may not discharge an offender from parole within a period of less than one year after release from prison. K.S.A. 2017 Supp. 22-3722.

For more information on parole and off-grid offenses, see the Off-grid Crimes section of Chapter I.

VIOLATIONS OF POSTRELEASE SUPERVISION CONDITIONS

For crimes committed before April 20, 1995, a finding of a technical violation of the conditions of postrelease supervision will result in imprisonment for a period not to exceed 90 days from the date of the final revocation hearing; for crimes committed on or after April 20, 1995, a technical violation will result in imprisonment for six months and such time may be reduced by not more than 3 months based upon the inmate's conduct, work and program participation during the imprisonment period. K.S.A. 2017 Supp. 75-5217(b). If the violation results from a conviction of a new felony or misdemeanor, upon revocation of postrelease supervision, the offender will serve a period of confinement, to be determined by the Prisoner Review Board. K.S.A. 2017 Supp. 75-5217(c) and (d).

On and after July 1, 2013, an offender who is granted early discharge from postrelease supervision pursuant to K.S.A. 2017 Supp. 22-3717(d)(2), and commits a felony during the time in which the offender would have been under supervision had it not been for discharge, may be sentenced to prison for the new felony even if the sentence for such felony is presumptive nonprison. K.S.A. 2017 Supp. 21-6604(f)(2).

CHAPTER XI: RETROACTIVITY OF SENTENCING GUIDELINES

The retroactive provision of the KSGA applies to incarcerated offenders who would have been considered presumptive probation candidates had they been sentenced as if their crimes occurred on or after July 1, 1993, or who would have been placed in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes, had they been sentenced as if their crimes occurred on or after July 1, 1993. K.S.A. 21-4724(b)(1). For offenders sentenced before July 1, 1993, the Kansas Department of Corrections (KDOC) was required to assess each offender's possible eligibility for retroactive application of the KSGA by determining the severity level of the crime(s) of conviction as if the crime(s) had occurred on or after July 1, 1993, and the offender's criminal history. K.S.A. 21-4724(c)(1).

Once an offender was determined to be eligible for the retroactive application of the sentencing guidelines, the KDOC was to issue a report indicating such to the offender, prosecutor, and the sentencing court. K.S.A. 21-4724(c). The criminal history classification determined by KDOC was to be deemed correct unless an objection was filed by either the offender or the prosecution within the 30 days provided to request a hearing. K.S.A. 21-4724(c)(4). If a hearing was requested within the 30 days, the parties could challenge the KDOC's determination of the crime severity or the criminal history, or seek a departure sentence if the offender was eligible for conversion of the sentence to a guidelines sentence. K.S.A. 21-4724(d).

If no hearing was requested, the sentence was converted and the offender was released after serving the midpoint sentence of the range in the applicable sentencing guidelines grid block. K.S.A. 21-4724(d)(1). If a hearing was requested, the sentencing court determined whether the offender was eligible for conversion to a guidelines sentence and the appropriate duration of that sentence, within the limits imposed by the sentencing guidelines. K.S.A. 21-4724(d)(2). The presence of the offender in person at the hearing was not required but counsel had to be appointed. K.S.A. 21-4724(d)(4), (5). No sentence could be increased through retroactive application of the guidelines. K.S.A. 21-4724(e).

For those offenders who committed crimes prior to July 1, 1993, but who were sentenced after that date, the sentencing court was to impose a sentence pursuant to the law in effect before July 1, 1993. However, the sentencing court was also required to compute the appropriate sentence had the offender been sentenced pursuant to the KSGA. K.S.A. 21-4724(f).

CONVERSION OF SENTENCE FOR A CRIME COMMITTED BETWEEN JULY 1, 1993, AND MARCH 24, 1994

Prior to March 24, 1994, if an offender was sentenced to prison for a crime committed after July 1, 1993, and while the offender was on parole or conditional release for a crime committed prior to July 1, 1993, the old sentence was to be converted into a determinate sentence to run consecutive to the new sentence as follows:

- Twelve months for class C, D or E felonies or the conditional release date whichever is shorter; and
- Thirty-six months for class A or B felonies or the conditional release date whichever is shorter.

The converted sentence for crimes committed prior to July 1, 1993, was to be aggregated with the new consecutive guidelines sentence. See K.S.A. 1993 Supp. 22-3717(f)(1) and (2).

CHAPTER XII: POINTS OF INTEREST ABOUT THE GUIDELINES

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE SENTENCING COURT

CRIME SEVERITY AND CRIMINAL HISTORY CONSTRAIN SENTENCING DECISIONS

The KSGA provides a grid-based sentencing scheme dependent on two controlling factors: the crime severity level and the criminal history of the offender. The drug and nondrug sentencing grids indicate the range of sentence lengths (duration) presumed by statute to be appropriate for an offender. Further, they indicate whether the defendant should be presumed by statute to be granted probation or remanded to prison (disposition). The sentencing court has discretion to grant a sentence other than that presumed by the grid box in the form of a departure sentence if the court finds substantial and compelling reasons to do so. If the offender's case falls in a border box, the length of sentence is still presumed under the KSGA, but the sentencing court, without finding substantial and compelling reasons, can grant an optional nonprison sentence of probation. An "optional nonprison sentence" is a sentence which the court may impose, in lieu of the presumptive sentence, upon making the following findings on the record:

- An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and
- the recommended treatment program is available and the offender can be admitted to such program within a reasonable period of time; or
- the nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the court regarding the imposition of an optional nonprison sentence shall not be considered a departure and shall not be subject to appeal.

GUIDELINES LEAVE ROOM FOR PROPERLY JUSTIFIED EXERCISE OF DISCRETION

The KSGA offers an objective approach to sentencing without placing undue limitations on the discretion of the sentencing court. The guidelines establish presumptive rather than mandatory sentences. Upon motion of either party or upon its own motion, the sentencing court may depart from the presumed disposition established by the guidelines. The sentencing court may similarly depart upward or downward from the presumptively appropriate duration of any prison term established by the sentencing guidelines. Such departures must be supported on the record by substantial and compelling reasons, which may include aggravating or mitigating circumstances specifically enumerated in non-exclusive lists of departure factors found within the sentencing guidelines provisions.

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be "unconstitutional on its face" for the imposition of upward durational departure sentences. Both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were subsequently amended to correct the problem arising from *Gould*. Effective June 6, 2002, the jury determines all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. K.S.A. 2017 Supp. 6815(b) [formerly K.S.A. 21-4716]. Evidence of aggravating circumstances is either presented during the trial of the matter or in a bifurcated jury proceeding following the trial or plea. K.S.A. 2017 Supp. 21-6817(b)(2).

Certain offenses (i.e., those that fall into border boxes on the guidelines grids) allow the sentencing court the option to impose a nonprison sentence without making a departure. However, the sentencing court also has the discretion to decide whether sentences should run concurrently or consecutively. K.S.A. 2017 Supp. 21-6819.

PRESENTENCE INVESTIGATION REPORT IS MANDATORY

Another benefit of the KSGA for the sentencing court is the fact that a Presentence Investigation Report is mandatory, which ensures that the court will be in possession of the most complete criminal history information involving the offender. K.S.A. 2017 Supp. 21-6813(a).

PLEA AGREEMENTS

The sentencing court remains free to accept or reject any plea agreement reached by the parties that is otherwise authorized by the KSGA. However, the court may impose up to the maximum sentence provided in the applicable grid box, even if the parties have recommended a lesser sentence. While plea bargaining may not be used to exact a promise from the prosecutor not to allege prior convictions that will enhance the crime severity level of the offense, or will affect the determination of the offender's criminal history category, plea bargaining is otherwise permissible. K.S.A. 2017 Supp. 21-6807(b)(4) and 21-6812.

The offender may enter a plea to the charged offense, or to a lesser or related charge in return for the dismissal of other charges or counts, a recommendation for a particular sentence within the appropriate sentencing range on the grid, a recommendation for a departure sentence where departure factors exist and are stated on the record, an agreement that a particular charge or count will or will not be filed, or any other promise not prohibited by law. K.S.A. 2017 Supp. 21-6807(b)(4) and 21-6812 and K.S.A. 2017 Supp. 22-3210.

Whether the sentencing court accepts or rejects any proposed plea agreement, the court will often be making a decision whether to accept a plea of guilty or no contest from the offender before coming into possession of all criminal history information that is required for imposition of sentence. Nevertheless, the sentencing court is still able to advise the offender of the sentencing consequences of the plea by simply informing the offender of the entire range of sentences provided by the grid for the severity level of the crime to which the plea is being entered. K.S.A. 2017 Supp. 21-6807 and K.S.A. 2017 Supp. 22-3210(a)(2).

While subsequently discovered prior convictions cannot then be used to enhance the severity level of the crime to which a plea has been accepted, they can be counted in the offender's criminal history. K.S.A. 2017 Supp. 21-6807(c)(4).

SUGGESTED SENTENCING PROTOCOL UNDER THE KSGA

1. ANNOUNCE THE CASE.

2. HAVE COUNSEL STATE THE APPEARANCES FOR THE RECORD.

3. GIVE AN OVERVIEW OF HOW THE DEFENDANT WAS FOUND GUILTY.

- Guilty plea
- No contest plea
- Bench trial
- Jury trial

4. CONFIRM THAT EACH PARTY HAS BEEN SUPPLIED WITH A COPY OF THE PRESENTENCE INVESTIGATION REPORT (PSI).

5. ASK EACH PARTY IF THERE IS A CHALLENGE TO THE CRIMINAL HISTORY.

- Require the parties to answer on the record.
- Address the defendant personally and ask whether he acknowledges the accuracy of the criminal history set out in the Criminal History Worksheet. K.S.A. 2017 Supp. 21-6814.
- If there are challenges to the criminal history, take up each challenge and rule on each challenge. The offender must specify the exact nature of any alleged error if he or she objects to his or her criminal history worksheet.
 - Criminal history shall be established by a preponderance of the evidence. The burden of proof is on the State.
 - A certified or authenticated copy of a Journal Entry is sufficient proof of a prior offense unless the defendant denies he or she is the person named. See *State v. Staven*, 19 Kan. App. 2d 916, 881 P.2d 573 (1994).
 - If time to challenge the criminal history was not available prior to the sentencing hearing, additional time must be provided. See *State v. Hankins*, 19 Kan. App. 2d 1036, 880 P.2d 271 (1994).
 - Burden is on prosecution when defendant objects to criminal history classification. See *State v. Schow*, 287 Kan. 529, 197 P.3d 825 (2008). However, if criminal history has previously been established, and the offender later challenges the established criminal history, the burden shifts to the defendant pursuant to 2009 Legislation. K.S.A. 2010 Supp. 21-4715(c), prior to its repeal, now at K.S.A. 2017 Supp. 21-6814.
- If changes are made to the defendant's criminal history, the court should also make the changes on the Criminal History Worksheet.
- If the defendant's criminal history score is modified as the result of a challenge, confirm that the parties are prepared for sentencing and, if so, proceed.

6. STATE THE PRIMARY OFFENSE OF CONVICTION, THE CRIMINAL HISTORY SCORE, THE RANGE OF IMPRISONMENT SENTENCE LENGTHS (AGGRAVATED, STANDARD, MITIGATED) IN THE APPLICABLE GRID BOX, ANY GRID BOX PRESUMPTION (IMPRISONMENT, PROBATION, BORDER BOX), ANY SPECIAL RULE THAT AFFECTS THE GRID BOX PRESUMPTION, THE PERIOD OF POSTRELEASE SUPERVISION FOLLOWING RELEASE FROM IMPRISONMENT, THE APPLICABLE

PERCENTAGE OF GOOD TIME CREDIT THAT CAN BE EARNED, THE LENGTH OF THE PERIOD OF PROBATION, IF GRANTED, AND THE AGENCY TO SUPERVISE SUCH PROBATION.

7. IF THERE ARE ADDITIONAL FELONY OFFENSES, FOR EACH SUCH OFFENSE, IN ORDER OF DECREASING SEVERITY, APPLY CRIMINAL HISTORY “I” TO THE ADDITIONAL OFFENSES AND STATE THE INFORMATION IN PARAGRAPH 6 APPLICABLE TO THE ADDITIONAL OFFENSES.

8. IF REQUESTS FOR DEPARTURE HAVE BEEN FILED, EXPLAIN TO COUNSEL HOW YOU WILL HANDLE THE DEPARTURE HEARING.

- There is no prescribed proceeding for a departure hearing under K.S.A. 2017 Supp. 21-6817.
- A departure hearing may be conducted as a separate hearing, or the motion may be heard preceding other oral arguments and evidence on sentencing.
- If a separate departure hearing is held, the court may rule on the departure at the end of the hearing, “or within 21 days thereafter.” K.S.A. 2017 Supp. 21-6817(a)(2).

9. IF NO REQUESTS FOR DEPARTURE ARE ON FILE, ASK THE PARTIES WHETHER EITHER IS SEEKING A DEPARTURE.

This is not required by statute but it is the safest practice. In the event the PSI is not available in a timely manner, or other reasons arise which do not allow adequate time to prepare and present arguments regarding the issues of “departure sentencing,” a continuance must be granted. K.S.A. 2017 Supp. 21-6817(a)(1).

10. IF A DEPARTURE IS SOUGHT, CONDUCT A HEARING ON THE DEPARTURE MOTION(S). ALLOW COUNSEL TO ADDRESS THE COURT AND ALSO ALLOW THE WITNESSES FOR EITHER PARTY TO TESTIFY.

11. ASK EACH ATTORNEY FOR THE ATTORNEY’S SENTENCING SUGGESTIONS. THIS IS RELEVANT WHETHER OR NOT THE PARTIES HAVE AGREED TO RECOMMEND A PARTICULAR SENTENCE.

12. ASK IF ANY VICTIM(S) OR OTHERS WISH TO SPEAK CONCERNING THE SENTENCE(S) TO BE IMPOSED.

Following the rule in *State v. Parks*, 265 Kan. 644, 962 P.2d 486 (1998), non-victims and non-family members may also be permitted to submit written statements and/or speak.

13. ADDRESS THE DEFENDANT DIRECTLY (NOT HIS OR HER COUNSEL) AND CONDUCT ALLOCUTION UNDER K.S.A. 2017 SUPP. 22-3422 AND 22-3424.

Ask the defendant personally if he or she wishes to make a statement or to present evidence in support of mitigation of sentence. Allow such statements or evidence.

14. ASK THE DEFENDANT WHETHER THEY HAVE ANY LEGAL CAUSE TO SHOW WHY SENTENCE SHOULD NOT BE PRONOUNCED.

15. ANNOUNCE THE GRANTING OR DENIAL OF ANY REQUESTED DEPARTURE, CITING THE SUBSTANTIAL AND COMPELLING REASONS FOR THE DEPARTURE IF GRANTED.

- If a departure is denied there is generally no need to state the reasons for the denial. However, in denying a Jessica's Law departure back to a guidelines sentence, the record should be clear that the judge reviewed the defendant's asserted mitigating circumstances. See K.S.A. 2017 Supp. 21-6628(d).
- Statutory mitigating and aggravating factors may be found at K.S.A. 2017 Supp. 21-6815 (nondrug) and K.S.A. 2017 Supp. 21-6816 (drug).
- Sentencing courts must provide separate reasons based upon facts in the record for each durational and dispositional departure. See *State v. Favela*, 259 Kan. 215, 911 P.2d 792 (1996).
- Reasons for departure must be "substantial and compelling." See K.S.A. 2017 Supp. 21-6815(a), 21-6816(a) and 21-6818(c)(2).
- Findings of fact as to the reasons for departure shall be made regardless of whether a hearing was requested. K.S.A. 2017 Supp. 21-6817(a)(4).
- For sex offenders, a postrelease supervision period of up to 60 months may be ordered. K.S.A. 2017 Supp. 22-3717(d)(1)(D)(i). When imposing a durational postrelease supervision departure under K.S.A. 2017 Supp. 22-3717(d), state specifically on the record the substantial and compelling reasons to impose a departure. See *State v. Anthony*, 273 Kan. 726, 45 P.3d 852 (2002).

16. IF A SPECIAL RULE APPLIES, WHICH DOES NOT REQUIRE A DEPARTURE, STATE THE APPLICABLE RULE AND ITS EFFECT UPON THE SENTENCE IMPOSED.

See listing of special rules in Chapter V.

17. ANNOUNCE THE SENTENCE FOR THE PRIMARY OFFENSE.

Suggestion: Follow the information layout for the offense in the PSI. Example: Mr. Doe, for the primary offense of theft, a level 9 nonperson felony, with your criminal history of B, I sentence you to the standard term of 14 months in the custody of the secretary of corrections. Your departure request for probation is granted. The court finds substantial and compelling reasons for the departure as follows: the two person felonies in your criminal history arose from the same incident, a bar fight, which occurred twenty years ago; you have no convictions since you served those sentences; the victim of the theft, your mother, is convinced you stole from her to buy oxycodone to self-medicate the pain from back problems and you need drug treatment, not prison; a drug treatment program is available to you in the community; and, the State has joined in the request for a departure to probation. You are granted probation to be supervised by Community Corrections for 12 months. If your probation is revoked, you will be remanded to DOC to serve the time left on your sentence, after credit for time served, but you can earn up to 20% maximum good time credit. Upon your release from prison you would then be placed on postrelease supervision for 12 months.

18. ANNOUNCE ALL OTHER SENTENCES, STATING WHETHER EACH ADDITIONAL SENTENCE IS CONCURRENT OR CONSECUTIVE TO THE PRIMARY OFFENSE SENTENCE.

The Court *must state on the record* if the sentence is concurrent or consecutive, otherwise it becomes a concurrent sentence by default except as provided by K.S.A. 2017 Supp. 21-6606(c), (d) and (3). K.S.A. 2017 Supp. 21-6606(a).

As of July 1, 2012, when the Court imposes multiple sentences consecutively, the consecutive sentences shall consist of an imprisonment term which may not exceed the sum of the consecutive imprisonment terms, and a supervision term. The sentencing judge shall have the discretion to impose a consecutive

term of imprisonment for a crime other than the primary crime of any term of months not to exceed the nonbase sentence. K.S.A. 2017 Supp. 21-6819(b)(1). This allows for consecutive sentencing for a count other than the primary offense up to the maximum sentence rather than requiring the full nonbase sentence. This change is reflected and may be entered in the Journal Entry of Judgment, Additional Offenses.

The total length of all consecutive sentences imposed cannot exceed twice the base sentence. The “double rule” and “double-double rule” are found at K.S.A. 2017 Supp. 21-6819. The “double-double rule” applies to cap the total length of consecutive upward durational departure sentences. See *State v. Snow*, 282 Kan. 323, 342, 144 P.3d 729 (2006) and the subsequent *State v. Snow*, 40 Kan. App. 2d 747, 195 P.3d 282 (2008).

19. ESTABLISH RESTITUTION AMOUNTS, IF ANY. SCHEDULE A RESTITUTION HEARING, IF THIS IS IN DISPUTE. ASSESS, OR DECLINE TO ASSESS, WITH PARTICULARITY, COSTS, FEES AND EXPENSES.

20. ESTABLISH THE NUMBER OF DAYS OF JAIL CREDIT TO WHICH THE DEFENDANT IS ENTITLED AND THE DEFENDANT’S “SENTENCE BEGINS DATE.”

See K.S.A. 2017 Supp. 21-6615.

21. ADVISE THE DEFENDANT THAT THEY MAY HAVE RIGHTS OF EXPUNGEMENT.

See K.S.A. 2017 Supp. 21-6614.

22. ADVISE THE DEFENDANT OF THEIR RIGHT TO APPEAL BY FILING THE NOTICE WITHIN 14 DAYS, UNDER K.S.A. 2017 SUPP. 22-3608, AND THE RIGHT TO COUNSEL.

Even if defendant’s jury trial counsel was retained, advise the defendant that they have the right to appeal their conviction and sentence, and, if they are indigent, counsel and the costs of the appeal will be afforded them. K.S.A. 2017 Supp. 22-3424(b). Likewise, when a defendant has been sentenced on a conviction resulting from a guilty or no contest plea, even if defendant’s plea counsel was retained, advise the defendant that, if they are indigent and wants to appeal the sentence, counsel and the costs of the appeal will be afforded them. *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982).

23. ADVISE THE DEFENDANT OF THE PROHIBITIONS AGAINST A CONVICTED FELON POSSESSING A FIREARM, IF APPLICABLE.

See K.S.A. 2017 Supp. 21-6304(a)(1) through (a)(3).

24. ADVISE THE OFFENDER OF THE LOSS OF CERTAIN CIVIL RIGHTS SUCH AS THE RIGHT TO VOTE UNTIL THE OFFENDER’S SENTENCE IS FULLY DISCHARGED.

See K.S.A. 2017 Supp. 21-6613. Anyone convicted of a felony on or after July 1, 2002 may not vote until their sentence is completed. This specifically includes a sentence of probation.

25. IF DEFENDANT IS REQUIRED TO REGISTER UNDER THE KANSAS OFFENDER REGISTRATION ACT (K.S.A. 2017 SUPP. 22-4901 ET SEQ.), ENSURE THE AGE OF THE VICTIM IS INCLUDED ON THE JOURNAL ENTRY OF JUDGMENT.

At the time of sentencing or disposition for an offense requiring registration as provided in K.S.A. 2017 Supp. 22-4902, and amendments thereto, the court shall ensure the age of the victim is documented in the journal entry of conviction or adjudication. K.S.A. 2017 Supp. 22-4904(a)(2).

26. IF IMPRISONMENT IS ORDERED, REMAND THE DEFENDANT TO THE CUSTODY OF THE SECRETARY OF CORRECTIONS OR THE SHERIFF, OR ESTABLISH A DATE TO REPORT IF A STAY OF EXECUTION IS GRANTED AND IF THE DEFENDANT IS NOT IN CUSTODY. ESTABLISH AN APPEAL BOND AMOUNT, IF REQUESTED. IF PROBATION IS GRANTED, DIRECT THE DEFENDANT AS TO WHEN AND TO WHAT SUPERVISING AGENCY HE/SHE IS TO REPORT.

27. IF PROBATION IS ORDERED AND THE COURT WISHES TO WITHHOLD THE AUTHORITY OF COURT SERVICES OR COMMUNITY CORRECTIONS TO IMPOSE A 2-3 DAY JAIL SANCTION FOR PROBATION CONDITION VIOLATIONS, ENSURE THAT THE JOURNAL ENTRY FORM IS MARKED ACCORDINGLY.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE PROSECUTION

EMPHASIS OF GUIDELINES IS ON CRIMINAL HISTORY AND CRIME SEVERITY

The KSGA places the emphasis of the sentencing phase of a criminal prosecution on the two factors that are generally of greatest concern to the prosecutor, the criminal history of the offender and the crime severity. The prosecution can focus its efforts on establishing by a preponderance of the evidence any challenged aspect(s) of the criminal history information provided in the presentence investigation report and presenting to the sentencing court any aggravating or mitigating circumstances which may provide substantial and compelling reasons for the court to consider imposing a departure sentence. Properly authenticated copies of journal entries of convictions or the mandatory presentence investigation reports prepared in conjunction with the prosecution of cases for crimes occurring on or after July 1, 1993, generally will be sufficient. Other properly authenticated documents that may be of use in proving criminal history include plea transcripts and charging documents such as an information, complaint, or indictment. The prosecution is entitled to reasonable time to obtain the necessary proof of prior convictions. K.S.A. 2017 Supp. 21-6814.

The burden is on the prosecution when defendant objects to the criminal history classification. See *State v. Schow*, 287 Kan. 529, 197 P.3d 825 (2008). However, if criminal history has previously been established, the burden moves to the defendant, pursuant to 2009 legislation. K.S.A. 2010 Supp. 21-4715(c), prior to its repeal, or K.S.A. 2017 Supp. 21-6814.

PROVING THE AGE OF JESSICA'S LAW OFFENDERS

Imposition of an off-grid mandatory sentence of imprisonment under K.S.A. 2017 Supp. 21-6627 requires a factual finding that the offender was 18 years of age or older at the time of the offense. Unless the offender has stipulated to the offender's age, that age is a fact question that must be submitted to a jury and proved beyond a reasonable doubt. *State v. Brown*, 291 Kan. 646, 244 P.3d 267 (2011). The Kansas Judicial Council has suggested that the jury's factual finding on the offender's age be included under a separate question on the verdict form. See the Notes on Use under the various PIK-Criminal elements instructions for offenses subject to Jessica's Law enhancements.

LAW ENFORCEMENT PROTECTION ACT

The Law Enforcement Protection Act enhances the severity level of the crime if a trier of fact finds beyond a reasonable doubt that an offender committed a nondrug felony offense (or the offender committed an attempt or conspiracy to commit such an offense) against a law enforcement officer while the officer was performing the officer's duty or solely due to the officer's status as a law enforcement officer. K.S.A. 2017 Supp. 21-6804(y)(1). The special rule is applied as follows:

- For felonies levels 2 through 10, sentencing is enhanced by 1 level;
- For level 1 felonies:
 - The minimum sentence is life in prison;
 - The offender is not eligible for a sentence modification or probation;
 - The offender cannot be released on parole before serving 25 years of the sentence;
 - The offender is not eligible for good time credit; and
 - No other sentence is permitted.

If an offender is subject to a minimum presumptive sentence due to criminal history, the minimum sentence of 25 years does not apply. Instead, the longer minimum sentence applies. The sentence imposed is not considered a departure from the sentencing grid and cannot be appealed. Further, the enhancements do not apply to crimes where the factual aspect concerning a law enforcement officer is a statutory element of the offense.

This special rule (#48) is different from other special rules in that it raises the severity level of the crime. Therefore, it must be contemplated at the charging stage of the case, or at least before a plea or trial.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE DEFENSE

IMPORTANCE OF ACCURATE, VERIFIED CRIMINAL HISTORY

Because the KSGA focuses so heavily on the criminal history of the offender as a determining factor of the sentence that will be imposed, the defense will be provided with a copy of the mandatory presentence investigation report, including the criminal history worksheet, and have an opportunity to challenge any errors contained in the report. Immediately upon receipt of the report the defense may file written notice to the prosecution and the sentencing court alleging errors in the proposed criminal history worksheet. The burden will then fall to the State to verify and establish by a preponderance of the evidence the accuracy of any disputed portions of the alleged criminal history, and the sentencing court is authorized to correct any errors. Consequently, the defense has an important role in ensuring that the sentence is based on an accurate criminal history that has been properly verified. See K.S.A. 2017 Supp. 21-6814.

In addition, because a sentencing court may take judicial notice of a prior criminal history worksheet as an accurate reflection of criminal history for use in a subsequent case, the offender may waive the right to challenge any errors contained in the worksheet by failing to do so when the worksheet is initially prepared and served on the parties. Failure to challenge any errors in the criminal history worksheet at a hearing on the proposed conversion of a sentence for a crime committed prior to July 1, 1993, to a KSGA sentence pursuant to the retroactivity provisions of the guidelines may also operate as a waiver of that opportunity in future cases. See K.S.A. 2017 Supp. 21-6813. See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

The burden is on the prosecution when defendant objects to the criminal history classification. See *State v. Schow*, 287 Kan. 529, 197 P.3d 825 (2008). However, if criminal history has previously been established, the burden moves to the defendant, pursuant to 2009 legislation. See K.S.A. 2017 Supp. 21-6814.

CAN ADVISE THE OFFENDER ABOUT TIME TO BE SERVED IN DEFINITE TERMS

Because the terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA will be of definite duration, defense counsel will be able to advise the offender of the exact amount of time which the sentence will require the offender to serve once the criminal history is known.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR CLERKS OF THE COURTS

COPIES OF REQUIRED DOCUMENTS SENT TO THE KSSC

A copy of the Journal Entry of Judgment and the Presentence Investigation Report, including the Criminal History Worksheet, all on the mandated KSGA forms, must be attached together and forwarded to the Kansas Sentencing Commission within 30 days of sentencing. K.S.A. 2017 Supp. 21-6813(g) and K.S.A. 2017 Supp. 22-3439(a).

A copy of the Journal Entry of Probation Violation must be sent to the Kansas Sentencing Commission, along with a copy of the original Journal Entry of Judgment, the Presentence Investigation Report, and the Criminal History Worksheet within 30 days of the final disposition. K.S.A. 2017 Supp. 22-3439(b).

PROVIDING DOCUMENTATION OF PRIOR CONVICTIONS

Because of the importance of an accurate criminal history under the KSGA and the need to verify prior convictions that are counted in criminal history scoring, Clerks of the Courts may receive requests for certified copies of journal entries and other documents, including requests from other jurisdictions.

PRESENTENCE INVESTIGATION REPORT IS PUBLIC RECORD

The Presentence Investigation Report (PSI), with the exception of the sections containing the official version, the defendant's version, victim comments, and psychological (including drug and alcohol) evaluations of the defendant, will be public record and may be kept in the court file. K.S.A. 2017 Supp. 21-6813.